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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 13, 2017

(FRIDAY SESSION)

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 Taken before *D'Lois L. Jones*, Certified
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Documents referenced in this session

17-01 Commission to Expand Civil Legal Services Report 12-6-16

1 this study. And speaking of Orsinger, he chairs the Rules
2 15 through 165 subcommittee and therefore will study the
3 last item, Texas Rule of Civil Procedure 145.

4 Our meeting today on deep thoughts, this is
5 the third time we've done this, and it started sort of on
6 an ad hoc basis when Chief Justice Hecht and I were
7 thinking that it might be good to get everybody's
8 collective wisdom on ideas for improving the justice
9 system in Texas, and we did it actually six years ago,
10 because we have been doing it every other year in
11 coordination with the legislative session. I don't know
12 if I can say -- maybe the Chief can tell us when it's his
13 turn in a second if we've actually turned any of these
14 deep thoughts into rules or legislation, but it's always
15 been a healthy dialogue, and I think the members of the
16 other branches that have been here to hear it have said
17 that they've benefited from this. So that's what we're
18 about today, but before we get to that, as is customary,
19 Chief Justice Hecht will give us a report from the Court.

20 CHIEF JUSTICE HECHT: Thanks, Chip. Our
21 administrative work since our last meeting has been mostly
22 on two projects, which consumed an enormous amount of our
23 time and resources in the fall and earlier last year. The
24 first was the report of the Commission to Expand Civil
25 Legal Services, which we have shortened to the Justice Gap

1 Commission. So as we all know, all of these folks need
2 lawyers, all of these lawyers who need clients, and the
3 market can't get them together, and so what can we do to
4 improve that. There is a separate phenomenon that more
5 and more people are trying to represent themselves and
6 then yet another problem, which is that some people are
7 just abjectly poor and have trouble accessing the justice
8 system at all.

9 So for the abjectly poor we have Legal Aid
10 and legal services that the Court has been working on for
11 a long time; and for self-represented litigants, pro ses,
12 we thought about forms and various different ways to help
13 people see their own affairs through the court system.
14 This is yet a third idea, which is to try to make it
15 possible for lawyers actually to work for clients, but for
16 reduced fees that they can -- they can afford. Kennon
17 Wooten was on the commission, and she'll be here this
18 afternoon to talk about the details of that report, but
19 they were ideas like better referral services, so-called
20 pipeline to try to hook lawyers to clients and get them
21 all the way through to completion of a matter, navigators
22 at the courthouse to try to not only help push people in
23 the right direction at the courthouse but suggest to them
24 that they really need a lawyer and these people on this
25 list might be able to help, and some other ideas as well.

1 And that report came out in December, and Martha was --
2 took the laboring oar on it and has done just great work
3 on it, and the Court will be thinking about all of those
4 ideas and which way to go next in the next few weeks.

5 The second thing was a day-long meeting in
6 Dallas at Paul Quinn College that we called "Beyond the
7 Bench, a Summit on Law, Justice, and Communities." The
8 chief justices of the United States are concerned about
9 surveys and polling that indicate that friction between
10 law enforcement and communities is eroding confidence in
11 the courts. So just to take an easy example, you have a
12 car wreck case and during the voir dire somebody says --
13 or a lawyer says, you know, "We're going to have a police
14 officer testify in this case, and is there anything about
15 the fact that he's a police officer, knowing no more than
16 that, that would incline you to believe him or disbelieve
17 him?" And you get lots of responses.

18 We have reported problems with -- in the
19 family courts as well, people thinking they're not getting
20 a fair shake because maybe nobody gets a fair shake. All
21 of these reactions that we're concerned about because at
22 the end of the day the judiciary's biggest asset is trust
23 and respect, so we don't want to see that deplete, and
24 so the Court of Criminal Appeals and our Court invited
25 people from all aspects of the -- of politics and

1 community work and the court system to come and talk about
2 these issues for a day. So we had a large number of
3 judges. We had prosecutors, defense counsel, the ACLU,
4 the NAACP, Black Lives Matter, law enforcement, educators,
5 clergy, all sorts of people come and spend the day looking
6 at these issues from different perspectives. And the --
7 to be -- for the issues to be as volatile as they are, I
8 thought the day was very productive. Almost all the
9 comments were very positive about the experience, and we
10 have lots of good comments about what to do going forward,
11 which we are writing up in a report and will have out in a
12 few days. So this is -- something like this has been done
13 in three other states, but not to the extent that we did
14 it in Dallas, and I think it will be very helpful going
15 forward.

16 We continue to support the University of
17 North Texas' Dallas College of Law's application to
18 the ABA for accreditation. The Court gave students a
19 waiver for the next three bar exams, I think July,
20 February, and July, the next three bar exams, and they're
21 pursuing accreditation. The staff -- it's a very
22 complicated process at the ABA, but the initial staff
23 recommendation was negative. The people that actually
24 make the decision sent it back, remanded it to the staff
25 to look at some other things. Dean Furgeson thinks that's

1 a good sign, and it probably is. So we'll hear about that
2 in the weeks ahead.

3 Meanwhile, the Court formed a group to look
4 at entrance to the bar generally, and so a group of five,
5 maybe five of our deans, law school deans and some lawyers
6 and judges, are looking at whether the bar exam should be
7 revamped, shortened, whether we should go -- whether Texas
8 should go to the UBE, Uniform Bar Exam, that about 20 --
9 more than half the other states use, including New York,
10 but not including California, and there are all kinds of
11 issues with that. So we'll be looking for recommendations
12 from that group in the next couple of months about what to
13 do with the entrance to the bar and the application
14 process. So that's what we've been working on the last
15 several months administratively; and, of course, the
16 Legislature convened on Tuesday; and so we'll be involved
17 in their consideration of the budget, of course. Judicial
18 salaries, of course, but also continuing to work on
19 monitoring guardianship cases. There will be some
20 proposals on bail reform. There may be some on fines and
21 fees in misdemeanor cases and several other things that
22 are impacting the judiciary. So it should be a busy, busy
23 session.

24 So far the work that the Legal Aid community
25 is doing is very strong. We received a large sum of money

1 from a settlement under the Pope Act, which will help us
2 with funding for actually a couple of years to come, so
3 that's all positive, and so far no talk yet in the
4 Congress about cutting LSC funding. So we'll keep our
5 fingers crossed there, but we live in uncertain times. So
6 that's an update on our -- the Supreme Court's work.

7 CHAIRMAN BABCOCK: Great. Thank you, Chief.
8 As most of the people in the room know, Justice Jeff Boyd
9 is the Court's vice-liaison, and I don't know if that's
10 his title or not. Liaison in charge of vice, and he will
11 make his remarks, as is customary. Justice Boyd.

12 HONORABLE JEFF BOYD: Thank you, Chip, and
13 thank you, Chief, and my only goal this morning is to give
14 you a brief update on our e-filing process and where we
15 are on that, because it affects most of what everybody
16 does here. The JCIT, the Judicial Committee on
17 Information Technology, will be meeting again a week from
18 today. In civil, family, and probate cases the final
19 stage of implementing mandatory e-filing, the deadline was
20 last July. Everybody met that deadline, and e-filing in
21 those cases has been fully implemented quite successfully,
22 not without a few bumps in the road, but quite
23 successfully this past quarter. The first quarter of the
24 current fiscal year, which will be September through
25 November, we had over 2.8 million separate documents filed

1 through e-filing, which is the busiest quarter we've had
2 yet, and one would expect the numbers to keep going up,
3 but it reflects that the practitioners and courts and
4 clerks and others have fully signed on to the program, and
5 it's quite successful.

6 The next step is criminal e-filing, and the
7 Presiding Judge of the Court of Criminal Appeals is here
8 with us today. They -- that Court adopted a rule that
9 required a similar phase-in program for mandatory e-filing
10 in criminal cases, and the first deadline for that is
11 coming up this year. The Tyler Technologies, which is the
12 Office of Court Administration's state contractor, is
13 working closely with the counties to help ensure that
14 they're preparing not just those that are the first phase
15 but also those that are in the second and third phase of
16 the rollout, and it appears to be going well. Harris
17 County being such a large county, we're working
18 particularly hard with them to help them get to where
19 they'll be able to implement by that deadline.

20 So I think the Court of Criminal Appeals
21 plans to amend some rules to help further implement
22 e-filing in criminal cases. That pretty much leaves two
23 areas. One is juvenile cases, and so we are beginning to
24 look at what that should look like, and then the other are
25 administrative appeals, and we've identified -- internally

1 identified a good group of people to gather together this
2 year to begin looking at whether and how to implement
3 e-filing in the administrative at SOAH and through the
4 agency administrative proceedings, so we'll be looking at
5 that.

6 The JCIT's technology standards committee,
7 which meets regularly and revises and implements various
8 technological standards that's all Greek to me continues
9 to meet on a regular basis and work with those who need to
10 be involved to implement standards that help to maintain
11 uniformity throughout the state without necessarily --
12 it's a fine line between maintaining the necessary
13 uniformity on the one hand, but then allowing local
14 counties to do it the way that works best for them on the
15 other, and so we're constantly working on that.

16 And then the other final area on the filing
17 side is with the self-represented litigants, and, of
18 course, they're exempted from the mandatory e-filing, but
19 many of the counties have put kiosks out and to help
20 self-represented litigants file electronically because it
21 benefits the county because that's now the way their
22 systems are set up, and so we're continuing to look at
23 that as well.

24 The flip side of that coin from filing that
25 we have started to look at is then once these records are

1 there filed electronically and maintained electronically,
2 does that now offer opportunities for access to the
3 records electronically, and I had mentioned this briefly
4 at our last meeting. The program that we have implemented
5 is called Re:SearchTX, Re:SearchTX, which is the
6 nomenclature at the state level that's sort of
7 the equivalent you Federal practitioners would think of as
8 PACER, although it's not really modeled after PACER
9 because our system is a little different.

10 What we have done is made access available
11 to judges throughout the state, and the Court has asked
12 JCIT to explore the issues involved in then making access
13 available to lawyers in the cases that they're handling
14 and then potentially to other registered -- lawyers and
15 other registered users for cases beyond even those that
16 they are attorney of record in. That raises a lot of
17 issues like redactions and how to ensure that confidential
18 information and personal identifying information is
19 properly redacted from records before people can access
20 records online. A number of issues, and we've identified
21 the issues and asked the committee to look at those, and
22 their report is due to us later this month. At the JCIT
23 meeting next week they ought to be -- we expect they'll be
24 focusing a lot on that.

25 Revenue is a big issue for the counties and

1 the revenue they generate when you come and ask for
2 copies, paper copies, and some of the counties have
3 expressed concern about -- about loss of revenue, and so
4 we've asked JCIT to look at that issue and begin
5 identifying the way to solve that issue as well.

6 A number of counties that -- actually, the
7 county and district clerk's association has formally
8 expressed concerns about the process and has begun working
9 with individual counties, a number of whom the
10 commissioners courts have adopted resolutions expressing
11 opposition to any further rollout of access to court
12 records electronically, highlighting some of these issues.
13 We've begun communications with them trying to understand
14 and address their concerns. We've visited with key
15 legislators who -- some of the legislative leadership as
16 well as others whose local constituents have expressed
17 concern to them, and so I often tell the story how when we
18 rolled out mandatory e-filing all of these constituencies
19 were quickly identified.

20 The vendors who law firms and practitioners
21 contract with had a lot of concerns, and we worked hard
22 with them and overcame those concerns, and then the
23 practitioners who were pushing the button at 10:30 at
24 night and nothing was happening had a lot of concerns, and
25 we had to work very hard with them to overcome those

1 concerns. And all of them have legitimate concerns. When
2 you implement a process like this the key is identifying
3 the bumps in the road and figuring out how to smooth them
4 out. And then the trial judges had a lot of concerns, and
5 some still do, and we're continuing to do that. So same
6 thing on rolling out access, is if we're going to go down
7 this road, which we think we definitely should be
8 exploring, we want to identify the concerns, and so the
9 clerks are helping us do that, and we're looking at
10 solutions and expecting a good report from the JCIT at the
11 end of the month.

12 CHAIRMAN BABCOCK: Great. Thank you,
13 Justice Boyd. Any questions or comments with respect to
14 what Justice Boyd has just told us? All right. Anybody?
15 No? Munzinger?

16 MR. MUNZINGER: No, sir.

17 CHAIRMAN BABCOCK: A first for this
18 committee. Before we get to the next item on the agenda,
19 I want to welcome Judge David Newell, Judge, who is waving
20 his hand between Eduardo and Lisa, and we did have a
21 hastily done nameplate for you, Judge.

22 HONORABLE DAVID NEWELL: Awesome.

23 CHAIRMAN BABCOCK: We did not realize you
24 would be here, but Judge Newell is on the Texas Court of
25 Criminal Appeals, as most of you know, and he is going to

1 be our liaison going forward from that Court to this
2 committee; and right behind Justice Bland is Holly Taylor,
3 who is waving her hand and is assisting Judge Newell in
4 this effort, so we really appreciate your coming today and
5 we hope we'll see a lot of the two of you. Our next
6 guest --

7 HONORABLE DAVID NEWELL: Or gain weight.

8 CHAIRMAN BABCOCK: Any comments about that?
9 Any opposition? Our next speaker needs no introduction,
10 but Sharon Keller is the presiding judge of the Texas
11 Court of Criminal Appeals and has done terrific work with
12 that court, and she has some remarks that she is going to
13 make to us today. Judge.

14 HONORABLE SHARON KELLER: Thank you, Chip.
15 I think my job here today is to talk about matters that
16 are kind of hot topics in the criminal justice system, and
17 the legislative committees have done a lot of work in the
18 interim, and I'm going to summarize some of what they've
19 done just so you can know, get a heads-up about what's
20 going on and what to expect. This is all in the context
21 of being, quote, smart on crime. Starting about 10 years
22 ago, Texas started leading the country, actually, in
23 diverting prisoners from -- diverting people at the
24 beginning of the criminal justice system into treatment
25 beds or probation, and so Texas has been doing this for a

1 long time, and the idea is that we can maintain safety in
2 the communities and save money at the same time because
3 people are realizing how expensive the criminal justice
4 system is.

5 So the first thing and probably the biggest
6 thing that's going on right now is pretrial release.
7 There is a movement around the country that -- and the
8 idea is that it doesn't make sense to lock someone up who
9 is presumed innocent before trial, and then when he gets
10 convicted put him on probation and let him free in the
11 community. So this is going on in a lot of states, and
12 there are states that are ahead of Texas on this, but
13 there have been some interim reports that recommend a
14 number of ways to address this.

15 It has been shown that recidivism rates go
16 up if you're in jail for as little as three days because
17 you lose your job, you lose your ability to support your
18 family, and people will go out and commit more crimes. So
19 the recommendations are -- the judicial council has a
20 committee that has studied this as well, and the
21 recommendations to try to remedy some of these issues are
22 -- involve a validated risk assessment tool, and the most
23 popular or promising one right now is one that's been
24 created by the Arnold Foundation, and the reason it's
25 popular is that it doesn't take someone sitting down and

1 interviewing a defendant to score somebody on the risk
2 assessment tool, and it is not widely available right now,
3 but it's being tried out in several places around the
4 country.

5 The proposal by -- some of the legislative
6 proposals and from the judicial council would be to --
7 well, first of all, right now everyone is entitled to
8 bail, except someone who has been charged with capital
9 murder and proof is evident that he committed the offense.
10 So some of the recommendations would require statutory
11 changes, and some would require constitutional changes,
12 and the recommendation is that the Constitution be amended
13 so that trial judges are allowed to keep dangerous people
14 in jail and let -- there would be a presumption of -- for
15 personal release. So instead of having to go to a bail
16 bondsman and pay to get out of jail, there would be a
17 presumption that people can get out on a personal bond and
18 then the judge can -- trial judge can decide whether
19 that's a safe thing to do or not, based on the validated
20 risk assessment tool.

21 So the Senate Criminal Justice Committee has
22 recommended greater use of pretrial risk assessment and
23 personal bonds for nonviolent offenders. And, okay, the
24 other issue -- and this has been around for a long time
25 obviously -- is mentally ill offenders, and the

1 Legislature has taken a great interest in trying to divert
2 people from the criminal justice system if they have
3 mental illness and they can be treated instead of going
4 through the system, because it's expensive, and -- for one
5 thing it's expensive. Also, it's more effective to treat
6 people than to just keep them in jail. The House Select
7 Committee on Mental Health has recently recommended the
8 expansion of crisis intervention teams, which exists
9 everywhere, but they are -- they are -- they work better
10 in some communities than in others. They've also
11 requested more judicial education on mental health issues,
12 and the Texas Indigent Defense Commission has requested
13 funding for mentally ill -- representation of mentally ill
14 offenders, too.

15 Of course, the Timothy Cole Exoneration
16 Review Commission just issued their report, and they had a
17 number of recommendations, but the biggest one is to
18 require -- require recording interrogations in all felony
19 cases. Any interrogation in felony cases to be recorded,
20 and that summarizes I think one of the big issues in
21 criminal justice. I'm going to mention another one just
22 because I think it might be on the horizon, and it is a
23 controversial issue. There was an article in the December
24 issue of the *Texas Law Review* about judicial involvement
25 in criminal cases and plea bargains. Since the Seventies

1 that has been considered kind of an illicit practice, but
2 the article says that it's going on, and I think it
3 surveyed 10 states in various widely divergent manners,
4 and it's not done in Texas, or it's not done above the
5 radar, but I think we might be looking at it as maybe a
6 pilot project because it is a docket management tool. And
7 apparently it's been going on in civil cases for a long
8 time in various ways; and now that there is, according to
9 the article, more transparency about dockets in criminal
10 cases, there is a desire to move cases faster; and
11 apparently in some states or maybe all the ones that were
12 surveyed, it's popular among prosecutors, defense
13 attorneys, and judges and defendants. So we'll see if we
14 do anything with that, but if we do, it will be in the
15 next couple of years. And that's all I have to say, Chip.

16 CHAIRMAN BABCOCK: Great. Thank you very
17 much, Judge. Any comments or questions of the presiding
18 judge of the Texas Court of Criminal Appeals? Katherine.

19 MS. KASE: I just have one. I was wondering
20 -- I'm fascinated by this idea of being involved in plea
21 bargaining. Would that include mediation?

22 HONORABLE SHARON KELLER: It does.

23 MS. KASE: Thank you.

24 HONORABLE SHARON KELLER: I mean, it varies
25 from state to state, and the article -- you ought to read

1 the article. It was a long article in the December issue
2 of the *Texas Law Review*, and I think it could involve
3 mediation.

4 MS. KASE: Okay. Thank you.

5 CHAIRMAN BABCOCK: Any other questions?
6 Comments? Okay. Well, yesterday when our agenda was
7 released and put on the Supreme Court's website, I
8 received a flurry of communication praising the fact that
9 we were going to have a former UT basketball star and
10 coach of the Harlem Globetrotters to speak to us, but
11 unfortunately, Jimmy Blacklock is not that Jimmy
12 Blacklock, but rather the --

13 MR. BLACKLOCK: I have Googled my name
14 before, and so I'm very aware that most people would think
15 that that's who I am.

16 CHAIRMAN BABCOCK: Well, you know, despite
17 that and the obvious differences, you still have game, and
18 we're about to hear it. Jimmy is -- as some of you may
19 know, is a Longhorn, is an undergrad, but as best I can
20 tell didn't play basketball there and graduated from Yale
21 Law School and went to work in the George W. Bush
22 administration as an assistant attorney general for civil
23 rights and then came to Texas and worked for General
24 Abbott, his office in the AG's office in Texas, and then
25 now is general counsel to the Governor, Governor Abbott.

1 So we're very honored to have you here today and look
2 forward to hearing what you have to say.

3 MR. BLACKLOCK: Thank you so much, Chip, for
4 the invitation, and thank you to the Court for the
5 opportunity to speak. On the topic of Texas basketball, I
6 did actually go to lots of games, and I even went with my
7 shirt off and my chest painted, which is about as close as
8 a guy like me could get to participating with the Texas
9 basketball team. I'm sure there are pictures of that out
10 there somewhere, but I'll cross my fingers that there
11 aren't.

12 Again, thank you so much. I'm the general
13 counsel for Governor Abbott. Of course, as you well know,
14 he is a distinguished attorney himself who was on the
15 Supreme Court and, of course, the attorney general, and so
16 he and his office take a keen interest in the work of this
17 committee and are grateful to all of you for the work that
18 you do to try to improve the quality of justice in Texas.
19 I don't want to take up too much time. I see that there
20 are a couple of topics on the schedule for later. One is
21 civil discovery reform, and another is access to justice,
22 and so I will just offer a couple of brief thoughts about
23 those two topics, and these thoughts are on behalf of our
24 office generally, but please don't take anything I say as
25 a proxy for what Governor Abbott himself might say.

1 On the topic of civil discovery, I know that
2 the Governor goes all around the state talking to business
3 leaders, people who hire Texans. Obviously one of the
4 highest priorities of his administration is promoting
5 economic growth, promoting job growth in the state of
6 Texas; and I know one thing that he hears all over the
7 place from CEOs, chambers of commerce, is that despite all
8 of the tort reform or at least the perception of tort
9 reform that's taken place, the cost of litigation remains
10 at a real drain on economic growth and on the ability of
11 businesses to hire more people and do things with money
12 that benefit the economy other than litigation. And one
13 of the primary drivers of the cost of litigation, as we
14 all know, is, of course, the cost of discovery.

15 I know the Court has asked the committee to
16 look at the discovery rules and think about amendments to
17 those rules, and so certainly we would ask -- we would
18 hope that the committee would bear closely in mind the
19 cost of discovery on litigants and on business when it's
20 doing these deliberations, and certainly the high cost of
21 discovery has a drain on the pocketbooks of litigants. It
22 also, in my view, detracts from the quality of justice
23 that we have, because we've all been in situations where
24 the cost of discovery, the cost of litigation, is actually
25 what is driving settlement discussions and what is driving

1 the ultimate outcome of a lawsuit that is filed; and
2 frequently settlement talks are driven by factors that
3 have nothing or very little to do with the only question
4 that ought to matter in our justice system, which is
5 whether one party is liable to another party.

6 So the cost of discovery has all kinds of
7 negative impacts on the economy and on the justice system.
8 I'm not here to offer easy answers. One thing I would say
9 is that the -- one cost of discovery that is exponentially
10 greater than it used to be, of course, has to do with
11 e-mail and the internet and the proliferation of documents
12 throughout the world; and the system tends to treat those
13 documents just like any other document that would have
14 been created 30 or 40 years ago; and, therefore, the cost
15 is just exponentially higher of preserving those documents
16 and producing them. And one thing that I think perhaps
17 the committee ought to think about is clarifying,
18 simplifying, reducing the burden of document retention in
19 this age of almost limitless creation of what we would all
20 consider documents.

21 The other thing I'll say about discovery
22 rules generally is that I think a committee like this
23 ought to keep in mind that -- and this is another thing
24 that goes back to what the business leaders might tell the
25 Governor, is that certainty and predictability and

1 stability in the system and predictability in the outcomes
2 is a key factor in the ability of a business or of any
3 litigant to anticipate the cost of litigation and to react
4 to that and to avoid protracted litigation. And one way
5 that I think rules of procedure could facilitate that sort
6 of stability is with clear rules based on numbers, number
7 of days, number of discovery requests, clearly
8 identifiable standards that limit or at least define the
9 scope of what's going on in the courtroom.

10 The alternative, of course, is standards of
11 reasonableness that vest a lot of discretion in district
12 courts, and I hope the committee will look on those sorts
13 of standards with a little bit of skepticism, because as
14 we all should admit, there is a variance in the quality of
15 district judges in the state. There's also a variance in
16 the philosophies and approaches that they will take; and
17 so when a procedural rule or discovery rule is couched in
18 terms of the discretion of the judge and the ideas such as
19 reasonableness, you're going to get all kinds of different
20 outcomes; and the only way for a court of appeals to deal
21 with that is through mandamus petitions, which is not the
22 ideal way for a court of appeals to be looking at an
23 issue; and the whole thing contributes to a lack of
24 stability and a lack of predictability.

25 The alternative, which is clear, bright line

1 rules, you know, of course, we cannot take and should not
2 even think about taking all discretion away from a judge
3 in most of these situations, but the clearer the rules
4 are, the easier it is for people to know what the outcome
5 is going to be beforehand and react to it without having
6 to go through all of the time and expense of litigation.

7 On to the topic of access to justice, I
8 think that the Court's done some wonderful work on this,
9 and thank you to Chief Justice Hecht for his championing
10 of this cause. You mentioned the unpredictability of
11 streams of taxpayer money for civil legal services, and
12 that's a fact at the Federal level, at the state level.
13 It's always going to be a fact. There's never going to be
14 any reliable stream of taxpayer money for those kind of
15 services; and that being the case, in order to -- rather
16 than just hope that more money comes in, I was glad to see
17 in the most recent report from one of the committees that
18 I saw some ideas that go more in the direction of opening
19 up the practice of law to new structures, perhaps even to
20 new people so that the supply of legal services is
21 increased. And it's just simple economics. If we
22 increase the supply, it's likely that the price will go
23 down.

24 We're talking for the most part about lower
25 end services when we talk about access to justice, and so

1 I encourage the committee to consider the extent to which
2 the ethics rules or other rules that the Court has could
3 be amended to allow people without a license, a law
4 license, to perform a lot of these functions. Perhaps
5 under the supervision of a lawyer, or I don't know what
6 the answer is, but changing perhaps the structures under
7 which -- the corporate structures under which legal
8 services can be provided is another idea that is --
9 perhaps could be addressed through the ethics rules. And
10 then perhaps we might need legislation that softens up the
11 unauthorized practice of law penalties so that people who
12 are competent to provide some of these basic services but
13 have not gone through the time and expense of getting a
14 law degree are able to provide services to people who need
15 them and who can't afford a licensed attorney.

16 I think that's about all that I have for the
17 group, but again, just want to thank you so much for the
18 opportunity to speak to this distinguished committee, and
19 I've got a meeting I have run to in a few minutes, but
20 thank you, Chip. Thank you, Chief.

21 CHAIRMAN BABCOCK: If anybody has any
22 questions, tell us when you have to go, and right off the
23 bat, Pete Schenkkan.

24 MR. SCHENKKAN: So what is the matter with
25 the basketball team?

1 MR. BLACKLOCK: It's gotten so bad I didn't
2 watch the last game. And they almost won it, so I should
3 have watched, so I don't know.

4 CHAIRMAN BABCOCK: I think this is the first
5 time anybody from the Governor's office has come and
6 interacted with us. Does the Governor have plans to --
7 maybe you can't answer this, but does the Governor have
8 plans to interact more aggressively in the justice system
9 here or leave that to the Court and the Legislature, or do
10 you know?

11 MR. BLACKLOCK: Well, I've been from a
12 distance, you know, aware of the charge to this committee,
13 and we're aware of it at the office and aware of the
14 impact that changes in the discovery rules could have
15 on -- those are big, big changes potentially on the table
16 in terms of the cost of litigation and the outcomes of
17 cases. And so certainly we're aware of the committee's
18 work and of the Court's desire that these rules be looked
19 at, and I think it's certainly conceivable that we would
20 want to weigh in from the Governor's office either for or
21 against proposals that come from the committee or other
22 proposals that the Court is considering on the discovery
23 rules.

24 CHAIRMAN BABCOCK: Great, thank you.
25 Justice Christopher.

1 HONORABLE TRACY CHRISTOPHER: Does your
2 office have a thought or a preference that the new Federal
3 rules are superior to the state court rules, or have you
4 looked at that at all?

5 MR. BLACKLOCK: I haven't thought too much
6 about that comparison.

7 HONORABLE TRACY CHRISTOPHER: Is there
8 thinking that things are cheaper in the Federal system
9 than in the state system?

10 MR. BLACKLOCK: I don't know about that.
11 I'll say one thing that I find vastly preferable about the
12 Federal system, and this doesn't necessarily go directly
13 to the cost of discovery; but the robust motion to dismiss
14 practice that exists at the Federal level and that allows
15 testing of the legal sufficiency of claims prior to or
16 generally speaking prior to the great cost of discovery is
17 something that I think is a -- is a great advantage of the
18 Federal system; and the existing motion to dismiss rule
19 that we have in Texas I think falls short of providing
20 litigants with the true ability to test the sufficiency of
21 claims prior to moving forward with litigation.

22 CHAIRMAN BABCOCK: Great. Any other
23 comments, questions? I think you're absolutely right. I
24 mean, my clients regularly complain bitterly about the
25 discovery that they're put through. Now, of course, I

1 tend to have corporate clients with lots of obligations to
2 retain information; and I think two years ago when we had
3 this session, the general counsel of ExxonMobil spoke to
4 that, and it's amazing the amount of money that they have
5 to spend just in retention, not even in producing
6 documents, but in retention. Well, thank you. Thank you
7 so much for being with us, and stay as long as you can.
8 Except that Levi Benton has a question before you sneak
9 out.

10 HONORABLE LEVI BENTON: Jimmy, thanks for
11 being here. I don't recall that we've had a chance to
12 meet, and I only offer this because Jim Perdue is not
13 here. Those on the plaintiff's side -- and I don't know
14 where Jim is on this necessarily -- might be less
15 resistant to changes in motion to dismiss practice if at
16 the same time you talked about making it easier to strike
17 frivolous defenses, making it easier to prove clear
18 liability. You know, you have to -- you have to give
19 something to take something, and those are my thoughts
20 about what Jim Perdue might say if he were here.

21 MR. BLACKLOCK: Well, that's a very fair
22 point, particularly on the first point that you made,
23 which was the ability to challenge the sufficiency or
24 validity of things in the defendant's pleading. I mean,
25 it seems to me that those two ought to go hand in hand,

1 and there ought to be the ability to challenge both the
2 claims in the petition and the defenses if they are
3 subject to challenge as a matter of law or as a matter of
4 obvious factual deficiency from the outset.

5 CHAIRMAN BABCOCK: Great. Any other
6 questions? Kent, that wasn't you raising your hand?
7 Okay. Well, again, thank you, thank you very much for
8 being with us, and stay as long as you can and duck out
9 when you need to.

10 MR. BLACKLOCK: Thank you.

11 CHAIRMAN BABCOCK: After I got all of these
12 congratulatory e-mails about having a former UT basketball
13 player and Harlem Globetrotter coach I got another flurry
14 about having a minor league hockey player in the Chicago
15 Blackhawk system, Cam Barker, with us. And, Cam, you
16 actually do look a little bit like a hockey player.

17 MR. BARKER: Thank you.

18 CHAIRMAN BABCOCK: But instead unless
19 there's a secret hockey pass lurking there, Cam is the
20 deputy solicitor general in the Office of the Texas
21 Attorney General, and we look forward to your remarks.

22 MR. BARKER: Thank you, and thank you for
23 the invitation to be here. I'm not missing any teeth as
24 far as I know, so I don't think I've played hockey. I'm
25 General Paxton's designee to this meeting, his designee to

1 a prior meeting, Shelley Dahlberg, was unable to be here
2 for health reasons, and so she expresses her regrets that
3 she couldn't be here, and General Paxton thanks you all
4 for the opportunity to have some input at this meeting and
5 also for your hard work in past sessions on implementing
6 some legislative enactments such as the judicial bypass
7 for parental notification statute that was passed, on
8 implementing rules that carry into effect last legislative
9 session on three-judge district courts. He's very
10 appreciative of the hard and dedicated work that you've
11 put into implementing those statutes and looks forward to
12 working with you as you implement future statutes.

13 I have to echo Jimmy's caveat about my
14 thoughts on this. I think it reflects the sentiment of
15 the office, but I don't claim to speak for General Paxton,
16 but we certainly echo Jimmy's thoughts about the
17 importance of having civil discovery rules improve
18 discovery cost and avoid settlements just to avoid the
19 nuisance value of litigation. Whenever that comes up, it
20 really strikes at the heart of the justice system when
21 you're rendering judgment on the merits and not just the
22 cost of administering justice.

23 And, secondly, when I was doing a little bit
24 of reading on access to justice, I certainly saw a lot
25 about innovative techniques that private companies are

1 trying to develop to create legal concierge services or
2 kiosks in malls and other things like that, and I'm sure
3 that those are pretty familiar to all of you, but to my
4 mind that just underscored the importance of pursuing
5 general goals like Jimmy discussed of removing barriers
6 that might exist, whether they be ethics rules or statutes
7 or policies towards enforcement of statutes that make it
8 easier for companies that might have innovative approaches
9 to bringing those with less means or less resources --
10 bringing them into the justice system and guiding them
11 quickly and cost efficiently. It seems to me there's a
12 lot of value that's been added there, and you can see some
13 parallels with some of the efforts they're trying to
14 implement with efforts that are going on in similar spaces
15 of, for example, financial advice or even medicine. And
16 so General Paxton is supportive of that general goal as
17 well.

18 Echoing off what, Justice Boyd, what you
19 were talking about earlier with bringing court filings
20 online so that the public can have access to them, I'm
21 sure you've thought about this as well, but what you were
22 saying about the fees that clerks' offices have been
23 charging and the need to collect them, that brings to mind
24 the Federal experience with PACER and they, of course,
25 charge fees for access to documents, but there's a

1 professor at Princeton, Ed Felten, and in the Harvard
2 Berkman Center that have created a work-around system for
3 that, RECAP, which is PACER spelled backwards. It is
4 software that people -- I think it's also a pun on
5 recapture, and it's software that people can install on
6 their computers, and when you have it, it automatically
7 saves to the cloud a copy of any document you download
8 through PACER and then makes it available for anyone else
9 who has the software involved. And it's an overlay on the
10 PACER system so that person doesn't even have to pay money
11 once one person has downloaded it, and of course, these
12 documents are generally in the public domain. So to my
13 mind that just underscores that the information wants to
14 be free, and I think to the extent -- I completely agree
15 that the public needs access and probably has a right to
16 access to court filings. To the extent that becomes open
17 to some members of the public and given the nature of
18 these as documents in the public domain, it seems to me
19 it's sort of unavoidable as a matter of technology and,
20 therefore, probably as a matter of policy that these
21 documents do be free and that the system itself be
22 designed to do this the right way rather than relying on
23 some sort of technological work-around which might arise
24 to fill that need.

25 Other than that, other than emphasizing the

1 -- our general agreement, particularly with removing
2 barriers to innovation by private companies that might
3 wish to fulfill some basic legal needs, the only other
4 thought I have to offer here today is really just a
5 report. And, Chief Justice Hecht, you alluded to this
6 earlier, that for the first time since the 2013 Chief
7 Justice Jack Pope Act raised the cap to \$50 million on the
8 amount that's contributed to the judicial fund for
9 indigent defense, the Attorney General's office in this
10 biennium has collected civil penalties in DTPA actions
11 that have reached the cap; and so the full 50
12 million-dollar amount has been added. And as Jimmy
13 alluded to earlier, this sort of funding can be sporadic,
14 which it might make it wise to say don't spend it all in
15 one place or too quickly. Thank you again for the
16 opportunity to be here.

17 CHAIRMAN BABCOCK: Thank you. Frank, did
18 you have a question?

19 MR. GILSTRAP: I do not.

20 CHAIRMAN BABCOCK: Okay. I thought I saw
21 you. Anybody else, questions or comments about what Cam
22 -- yeah, Chief Justice Hecht.

23 CHIEF JUSTICE HECHT: I would just say our
24 thanks to the Attorney General for his contributions to
25 our Legal Aid funding. This is discretionary on his part.

1 He doesn't have to do this, but he has completely and
2 consistently cooperated in giving us as much of the
3 settlement as he can after legal fees are paid and
4 expenses and so did General Abbott for years. So we're
5 very grateful to his office for their contribution.

6 MR. BARKER: I'll be sure to pass that
7 along.

8 CHAIRMAN BABCOCK: That's great. Yeah, pass
9 that along for sure. All right. Following up on what
10 Jimmy Blacklock and Cam had to say, the American College
11 of Trial Lawyers has begun a project which is just getting
12 underway, but I think the goal line or the objective is to
13 try to convince the states to follow the Federal lead on
14 discovery and this concept of proportional discovery with
15 certain factors to be considered by the trial courts. I
16 received a report in mid-December from Richard Holm, who
17 is the chair of the American College Judiciary Committee
18 and noted that last August the United States Conference of
19 Chief Justices, which include our own chief, were involved
20 in a program called "Call to Action, Achieving Civil
21 Justice for All, Recommendations to the Conference of
22 Chief Justices by the Civil Justice Improvements Committee
23 for Improvement of State Judicial Systems."

24 And copied on this letter was Chief Justice
25 Hecht, the chief justice for the Supreme Court of Iowa,

1 who knew, and also Chief Justice Nathan Hecht, chief
2 justice of the Supreme Court of Texas. The only two
3 chiefs that were copied on this letter, but I know that
4 the American College, I think, is going to drive something
5 toward the Federal rules, and that used to be a dirty word
6 in this committee. If you said, "Let's do it like the
7 feds," that would doom whatever proposal it was to a
8 certain failure, but I don't know if that's still the case
9 or not. Anybody -- anybody have any thoughts on that?
10 Yeah, Justice Christopher.

11 HONORABLE TRACY CHRISTOPHER: I'm going to
12 ask you the same question. Do you feel like your
13 litigation in Federal court is cheaper or faster than in
14 state court, and if so, why?

15 CHAIRMAN BABCOCK: In some courts it is
16 cheaper and faster.

17 HONORABLE TRACY CHRISTOPHER: But, I mean,
18 is it something in the rules that you think makes it
19 cheaper and faster?

20 CHAIRMAN BABCOCK: Yes and no. I had a
21 recent experience where a very complicated, contentious
22 case where there's a lot of money at stake got to trial in
23 less than 12 months in Federal court, and the discovery
24 process was extremely streamlined because the trial judge
25 had his own special rules that were limiting in terms of

1 number of interrogatories, more limited than the Federal
2 rules, and number of request for documents; and there were
3 plenty of discovery fights; but they were resolved very
4 quickly and, you know, one side or the other might say
5 arbitrarily; but I didn't think so, and -- and that was
6 demonstratively cheaper and quicker; but could I say that
7 the Federal system as a whole is cheaper and quicker? I
8 wouldn't -- I wouldn't be able to say that. And I don't
9 know if anybody else here would have any views on that.

10 MR. LOW: Chip?

11 CHAIRMAN BABCOCK: Yeah, Buddy.

12 MR. LOW: Most of the Federal courts have
13 their own local rules that somewhat restrict that, so it
14 depends on which Federal court you're in.

15 CHAIRMAN BABCOCK: I know. That was my
16 point.

17 MR. LOW: So you can't compare all Federal
18 courts the same.

19 CHAIRMAN BABCOCK: Tom, then Richard
20 Munzinger.

21 MR. RINEY: Well, the most recent amendments
22 to the Federal rules are just slightly over a year old,
23 and I think we have yet to see what kind of impact they're
24 going to have. They certainly seem to me to be a move in
25 the right direction with respect to proportionality and so

1 forth. They certainly give you as a practitioner more to
2 argue in terms of limiting discovery.

3 CHAIRMAN BABCOCK: Richard Munzinger.

4 MR. MUNZINGER: Comparisons to your
5 experience in Federal court in my opinion can be twisted.
6 If you think that the Federal Rules of Civil Procedure in
7 comparison to ours can be judged by a person's experience
8 in Federal court, I had a case in the Northern District of
9 Virginia. My adversary submitted some interrogatories and
10 requests for production. I found seven Federal cases,
11 repeat, seven Federal cases, indicating that the discovery
12 was not permissible. I filed objections, cited the cases,
13 discussed them with my counsel in correspondence, who
14 laughed at me.

15 "Richard, this is the Northern District of
16 Virginia. There are no discovery disputes in the Northern
17 District of Virginia." I said, "Well, we'll see about
18 that." I went to the Northern District to Virginia to
19 present my complaints. The magistrate to whom the case
20 was assigned said, "There are no discovery disputes in the
21 Northern District of Virginia. Your cases are on point,
22 but it's hard to find cases in this area." I said, "Yes,
23 ma'am. I found seven. He didn't find any."

24 "Well, your objections are overruled.
25 You're going to trial in November." Now, that's --

1 CHAIRMAN BABCOCK: Quick.

2 MR. MUNZINGER: That's not the way to
3 compare the Federal rules. It's a way to compare elected
4 judges and appointed judges who are able to say, "You're
5 going to trial in 90 days and the heck with your
6 objections." I've been in courts where a Federal judge
7 told me in a securities fraud case where I said to him,
8 "Your Honor, it will take me a morning to put my expert on
9 on direct. For a jury to understand these securities
10 issues, you have to begin at brick one and work your way
11 there."

12 "Mr. Munzinger, your expert will not
13 testify. You will be given 10 minutes to read a summary
14 of his expected testimony to the jury." That was a trial
15 in the Western District of Texas. Is that what we want in
16 Texas?

17 CHAIRMAN BABCOCK: So I gather you would be
18 opposed to it?

19 MR. MUNZINGER: No, I'm just saying, it is
20 -- I mean no disrespect to anybody, but you can't simply
21 say the Federal dockets move quicker. Sure, they move
22 quicker because of rules like this, because of the
23 immunity that a judge has. In the Western District of
24 Texas in a certain judge's court we all knew that you had
25 three days to try the case. It didn't make any difference

1 what the case involved, you had three days. The judge was
2 going to the races in Ruidoso.

3 MR. SCHENKKAN: That does narrow the field.

4 CHIEF JUSTICE HECHT: You shouldn't speak
5 ill of the dead.

6 CHAIRMAN BABCOCK: Nobody knows who you're
7 talking about.

8 MR. MUNZINGER: Well, I mean, I haven't said
9 anything.

10 MR. LOW: He's not living now.

11 CHAIRMAN BABCOCK: You can't defame the
12 dead, so you're okay on that. Any other comments -- nice
13 to have you down at the table in your customary spot,
14 Richard.

15 MR. ORSINGER: I didn't know the chair was
16 open or I would have come earlier.

17 CHAIRMAN BABCOCK: Any other comments?
18 Yeah, Frank.

19 MR. GILSTRAP: Jimmy Blacklock from the
20 Governor's office mentioned two things, and maybe we ought
21 to get them out in the open. When, you know, he talked
22 about Federal -- a state analog to 12(b)(6).

23 CHAIRMAN BABCOCK: Yeah.

24 MR. GILSTRAP: That's what he's talking
25 about. I can't think of anything that raises the

1 litigation in every case more than having to respond to a
2 12(b)(6) motion in every Federal case, and it also slows
3 it down. He also talked about the difference between
4 rules and standards, and here the state courts do a better
5 job. We are more rule based, and we don't have as many
6 cases like the feds have where it's the test is totality
7 of the circumstances under a case by case basis, which is
8 an invitation to complete discovery. So in that case I
9 think the state courts do better and the Federal courts do
10 worse.

11 CHAIRMAN BABCOCK: Okay. Yeah.

12 MR. LEVY: I want to try to answer your
13 question. I can't definitively say it from the
14 perspective of my company which is cheaper, although I can
15 try to do some --

16 CHAIRMAN BABCOCK: Robert, you need to speak
17 up a little bit. The court reporter couldn't hear you.

18 MR. LEVY: Sorry. I wanted to answer the
19 question Judge Christopher asked about which is cheaper,
20 Federal court or state court, and I don't have the
21 specific information, but I can try to get at least from
22 my company. I do know that there is generally a
23 preference for Federal court in at least throughout the
24 country because of the, I think, more certainty of the
25 rules and process as well as opportunities to raise issues

1 with the court, both in a pretrial conference that has to
2 take place as well as the opportunity to raise a motion to
3 dismiss. And I recognize that for a party bringing a case
4 that's an obstacle, but for a party defending a case it's
5 an opportunity to try to resolve the case without having
6 to start into discovery, which is where the money really
7 starts to flow, and I think those processes are
8 opportunities to try to streamline case administration and
9 make it less expensive from start to finish as a well as
10 the chance to improve the discovery process, make that
11 more streamlined, focused on the information that matters
12 to the fact finder in a way that is efficient and brings
13 more certainty to the parties that are trying to address
14 discovery disputes.

15 CHAIRMAN BABCOCK: Great. And, Judge
16 Wallace, you're in the college. You're a district judge
17 and have seen all of this stuff; and as I recall, you and
18 Judge Evans at one of our prior meetings talked about
19 litigants' use of Rule 91a or attempt at the equivalent to
20 12(b)(6). Is that -- and I recall you both saying that it
21 was sporadic -- very sporadically used, there had never
22 been an award of attorney's fees to a losing movant under
23 91a even though the rule seems to suggest that there
24 should be. Any thoughts about 91a?

25 HONORABLE R. H. WALLACE: It's had very

1 little impact that I have seen on litigation. I think the
2 problem is people are reluctant to file them because of
3 the attorney's fees provision, and the burden is pretty
4 onerous on getting motion to dismiss. So even though I
5 think the Legislature had good intent it really hadn't --
6 I haven't observed any real impact and I would -- let me
7 say this about a 12(b)(6) type motion to dismiss. It's
8 been a few years since I was practicing, but I did do
9 Federal court some. I always felt like that just added a
10 preliminary level of litigation to the real battle more
11 often than not, and I think any time you start trying to
12 eliminate cases early on, cases or defenses -- and I agree
13 with what Levi said about defenses, too -- you run the
14 risk of just adding another level of litigation to that.

15 I'm not opposed to it, but I'm just saying
16 that's -- an example I think would be the efforts to get
17 rid of frivolous medical malpractice cases by having to
18 file an expert report early on in the litigation, and what
19 we see is that in almost every med mal case you're going
20 to have challenges to the expert report, and so -- and
21 more often than not those do not have -- you know, they
22 don't end up getting granted. Sometimes they do, but I'm
23 not sure that that has served the purpose that the
24 Legislature and we all hoped it would serve.

25 CHAIRMAN BABCOCK: Okay. Yeah, Judge

1 Evans --

2 HONORABLE R. H. WALLACE: And I would -- I
3 think proportionality in discovery would be, I think, a
4 good thing.

5 CHAIRMAN BABCOCK: Okay. Judge Evans, what
6 about you? Any experience with 91a?

7 HONORABLE DAVID EVANS: Yes, but it's the
8 same as R. H.'s, very limited and rarely brought. I think
9 for the same -- for the same reasons that R. H. pointed
10 out.

11 CHAIRMAN BABCOCK: Yeah. When we -- when we
12 passed -- when we recommended what became 91a to the Court
13 I thought the fee shifting thing was a good idea because,
14 like Frank, I thought in Federal court it was -- 12(b)(6)
15 was overused and used in many instances which were not
16 appropriate, and I figured the fee shifting would narrow
17 it down to only those instances where it really, really is
18 a slam dunk kind of thing, but I think it's -- just my own
19 experience, it's been -- it's done more than that because
20 clients just don't want any chance of having to pay the
21 plaintiff some money for an unsuccessful motion, so they
22 just don't file it. Yeah, Levi.

23 HONORABLE LEVI BENTON: Interestingly, my
24 experience with 91a in Harris County as an advocate is
25 different. They're being filed, but I think it needs to

1 be tweaked because the judiciary -- well, the frivolous
2 91a motions are being filed and driving up the cost of
3 litigation, which everyone around this table is concerned
4 with, and just like there are frivolous challenges to
5 expert reports. You know, I think the business community
6 might advance its ball on some of the issues that it's
7 concerned with if it would also attack the frivolous
8 issues on the other side, the challenges to expert
9 reports, challenges -- the 91a motions, where trial
10 judges, if they award -- if they award plaintiff's fees,
11 are expressly saying, "Well, you don't have to pay those
12 fees today. You need not pay them until there's a
13 judgment that's final," and I personally don't think
14 that's what the intent of the rule is.

15 CHAIRMAN BABCOCK: Yeah. Judge Christopher,
16 Justice Christopher.

17 HONORABLE TRACY CHRISTOPHER: Judge Bland
18 and I did a presentation to the appellate section in
19 Houston and asked them, you know, what rules they didn't
20 like, to come and give us that information, and one of
21 them was the 91a attorney's fees issue. It's just -- it
22 is causing problems. I'm not sure what the solution to it
23 is. It seems like a lot of appeals that we get,
24 especially when it's a legal issue that they've moved
25 forward on, people are waiving their right to attorney's

1 fees. And I think that has the effect of actually the
2 trial judge feeling a little more free to grant it,
3 because they're not so worried about the fee shifting, so
4 I do think it's something we need to look at.

5 CHAIRMAN BABCOCK: Okay. Kent.

6 HONORABLE KENT SULLIVAN: I just want to go
7 back to, you know, 50,000 feet for a second on the Federal
8 versus state court issue. My experience is that Federal
9 court sometimes may be a better fit for larger, more
10 complex cases. The rules in some measure may better
11 facilitate those cases, but the one thing that I think is
12 probably certain is the courts are much better resourced
13 to handle those cases. There's more money. There's more
14 staff. There are law clerks, and there's more time
15 because the dockets are often more manageable, less volume
16 that a judge has to say grace over.

17 The disadvantage certainly in Federal court,
18 I think, is that it is one size fits all, and Federal
19 courts do get small cases, you know, by way of subject
20 matter and otherwise; and Federal court is very ill-suited
21 for smaller cases that can't handle the expense. We do a
22 much better job in terms of acknowledging, and explicitly
23 I think, that there are different sizes and characters of
24 cases that need different tracking, and I think it's
25 something that we're going to try to acknowledge even

1 further by way of some of the proposals that will come
2 forward with the new discovery rules.

3 CHAIRMAN BABCOCK: Rusty, you try cases in
4 both systems, state, Federal, criminal, civil. You're a
5 five tool player in the baseball analogy. Is it cheaper
6 in Federal court or state court, or can you tell?

7 MR. HARDIN: I don't know that I've ever
8 tried to draw the comparison. I don't find it cheaper. I
9 like -- I like state court better just because there's
10 more discretion. There's a closer contact with the
11 litigants in a way that makes reasonable things easier to
12 accomplish than in Federal court. If I had --

13 CHAIRMAN BABCOCK: Contact with the
14 litigants with the judges you mean?

15 MR. HARDIN: Yes. Yes. Because the judges
16 are less constrained about what they can and can't do or
17 what they think they can and can't do or what they insist
18 on doing. I'm a big proponent of lifetime tenure in the
19 Federal system to guard against undue pressures, but it
20 brings a price that I don't -- I don't see in the state
21 court system, and so I don't know that it's any cheaper.
22 I've never really looked at it really as wanting to be in
23 one or the other versus cost. It's all the other reasons
24 that you want to be there.

25 CHAIRMAN BABCOCK: Yeah. Okay. Any other

1 comments? Buddy.

2 MR. LOW: Chip, you know, one of the things,
3 either state or Federal, we need to concentrate on the
4 conduct of the lawyers. I had a recent case where five
5 people killed, seven were injured. The client allowed me
6 to meet with the lawyers representing those people. We
7 worked out. We told them as soon as OSHA got through we
8 would have their expert. We gave each one, and the end
9 result, we met with them all together and we worked and
10 disposed of it within a year without one deposition being
11 taken, but that was the lawyers agreeing.

12 You remember David Beck had some proposal he
13 wanted about lawyer conduct and so forth, and we need to
14 concentrate and train the lawyers a little better. I
15 don't know how to do it. I can tell you the problem, but
16 I can't tell you the answer.

17 CHAIRMAN BABCOCK: Okay. Well, Dean
18 Farnsworth will be here to tell us the answer in a little
19 bit. Frank.

20 MR. GILSTRAP: Quick word on 91a. My
21 experience matches Judge Evans and Judge Wallace. You
22 don't see many, but there are some, and when you start
23 reading the cases you quickly realize that the courts that
24 hear these cases are not applying the standard that we
25 talked about in this committee, which was an extremely

1 difficult standard. I think we even had one comparison
2 that the only time you didn't have a case that had -- a
3 case that had no reasonable basis in fact was if you
4 alleged that the Martians had kidnapped you from a flying
5 saucer, but it was an extremely difficult standard. It's
6 not being applied that way. They're applying it more like
7 a 12(b)(6) motion.

8 CHAIRMAN BABCOCK: Okay. Anybody else have
9 comments on that? All right. Well, we have a -- our next
10 speaker is Katherine Kase, who is the long-time executive
11 director -- was the long-time executive director of the
12 Texas Defender Service. She has shed those
13 responsibilities, I think she will agree willingly and
14 gladly, but is still senior counsel to the Texas Defender
15 Service and has a very, very interesting topic for us to
16 consider. Katherine.

17 MS. KASE: Thank you. Thanks for having me
18 here today. Those of us in the criminal bar who work on
19 capital cases have been watching the progress of the
20 implementation of the Atkins case, which exempts people
21 with intellectual disability from the death penalty. At
22 any given time in the state of Texas, according to the
23 Office of Court Administration, we have between 650 and
24 800 pending capital murder cases in courts around the
25 state. The majority of those cases are concentrated in

1 the urban counties, between 180 and 200 in Harris County
2 alone. Those cases stay on the docket for about 18
3 months. Then Dallas and Tarrant Counties and Bexar, and
4 of course, for those of you who watch where death
5 sentences are imposed in Texas, they tend to come out of
6 urban counties, and my editorial comment would be because
7 that's how we fund criminal justice is, you know, in the
8 county -- we do have state support, but counties are
9 bearing the cost, and so largely we're seeing death
10 sentences out of these urban counties, which also are the
11 counties with the busiest dockets in the court system.

12 So since *Atkins vs. Virginia* was decided in
13 2002, our Texas Legislature, despite many efforts on the
14 part of the judiciary and the bar has been unable to pass
15 any law -- any rules about how these determinations of
16 intellectual disability are to be made. Now, I'm going to
17 set aside for a moment the definition of intellectual
18 disability, which the Supreme Court is grappling with
19 again in the Moore case, which is a case out of Texas.
20 This has to do with the procedure for how do courts handle
21 cases where there are questions of intellectual
22 disability. And as even the Court of Criminal Appeals has
23 noted in the case of *In Re: Allen*, which is 462 S.W.3d 47,
24 a case decided in 2015, and it's a mandamus issue, the
25 Court itself noted that the Legislature has failed to act

1 and has failed to set out procedures. And Allen concerned
2 a capital case out of Dallas where the defense asserted
3 that the defendant was intellectually disabled and,
4 therefore, should be exempt from the death penalty and
5 asked the trial court to decide that issue pretrial; and
6 then, of course, if the court decided that in the judge's
7 opinion the -- that the defendant wasn't intellectually
8 disabled, that issue would then go to the jury at
9 punishment in accord with *Ring vs. Arizona*.

10 So in that case the trial judge said
11 "Certainly I'm willing to make this decision," having a
12 full and fair hearing with the experts and hear all of the
13 testimony, and the prosecution took the judge up on
14 mandamus. The Court of Criminal -- this went through the
15 intermediate appellate court, came to the Court of
16 Criminal Appeals, which ultimately said that, you know,
17 that this pretrial determination of intellectual
18 disability didn't call for the execution of a ministerial
19 act, you know, that the court of appeals decision to
20 rescind the conditional grant of the writ of mandamus was
21 granted; and so, therefore, you know, the court could go
22 forward, the trial court could go forward in deciding this
23 intellectual disability issue pretrial.

24 And for those of us in the criminal defense
25 bar and particularly in the capital defense bar, we

1 certainly appreciate what the Court of Criminal Appeals
2 was constrained to do here because the Legislature has
3 failed to act; but in truth and in fact, we've got lots of
4 capital cases at the pretrial stage where there are issues
5 of intellectual disability; and it's now dependent on
6 defense lawyers to know that they should seek a pretrial
7 determination and then it's up to the discretion of the
8 trial court judge.

9 Our request here today is that the Supreme
10 Court in concert with the Court of Criminal Appeals
11 consider exercising its rule-making authority to
12 promulgate procedural rules that instruct trial court
13 judges on how to determine intellectual disability in a
14 pretrial hearing. Again, setting aside the definition of
15 intellectual disability, I'm talking about a procedure so
16 that we can conserve judicial economy and efficiency, we
17 can avoid impaneling death qualified juries, which take
18 sometimes months to choose; and in those cases where it's
19 clear that someone is intellectually disabled and should
20 be exempt, we get those cases determined, off the trial
21 docket.

22 And so that this body understands, a
23 determination of intellectual disability does not exempt a
24 person from punishment. That individual is punished.
25 They're sentenced to life in prison without the

1 possibility of parole. The only issue is that they don't
2 face execution by lethal injection, but our concern is, is
3 that in these cases, you know, since 2002, our legislators
4 have just not been able to come to agreement on a
5 procedure, and I think there is a great deal of
6 frustration, at least from my perspective, in the defense
7 bar. I certainly experience -- I hear about frustration
8 from criminal district court judges about the
9 Legislature's failure to act; and so, therefore, that's
10 why I bring this to this body and request study of it and
11 consideration of the promulgation of procedural rules for
12 this pretrial determination of intellectual disability.

13 CHAIRMAN BABCOCK: What would the rules look
14 like? What would -- you say we're not going to deal with
15 the definition of intellectual disability, but what would
16 the procedures be?

17 MS. KASE: When I was practicing in New York
18 and doing capital defense in New York, there actually --
19 when New York had an operational death penalty statute,
20 actually gave trial judges the ability to hold a pretrial
21 hearing on determining intellectual disability, and this
22 was pre-Atkins. New York had some sensitivity to this
23 issue, and I don't know why; but so I would say that these
24 rules would set out clearly that the defense has to move
25 for a hearing, it's got to provide proof to a certain

1 level of proof so it's not just a declarative motion that
2 says, "We believe there is an issue of intellectual
3 disability here."

4 There's got to be some standard, some
5 normative standard for a level of proof, and then that the
6 trial judge has the authority to hold an evidentiary
7 hearing, make findings of fact, conclusions of law, and
8 determine whether the individual is exempt from the death
9 penalty as a result of having intellectual disability.
10 And then if the determination is that he's not exempt,
11 that issue can -- you know, the case can go forward to
12 trial, and the issue can be set on the trial docket for a
13 jury to determine.

14 CHAIRMAN BABCOCK: Is the hearing
15 discretionary or mandatory?

16 MS. KASE: I would say that, you know,
17 certainly from my perspective -- and I think reasonable
18 minds could differ here, that if the -- if the level of
19 proof, you know, the initial level of proof is met, I
20 think it should be a mandatory hearing for the trial court
21 to conduct.

22 CHAIRMAN BABCOCK: So there would be an
23 initial showing on the papers and then that would trigger
24 or not a mandatory hearing?

25 MS. KASE: Correct, but I think that

1 reasonable minds might differ, but, I mean, right now it's
2 certainly discretionary, and it's not clear to us, and we
3 monitor all of the trial level capital cases in the state
4 of Texas that these hearings are going on regularly. We
5 actually see very few and yet the numbers of lawyers who
6 come to us saying that they have cases that seem to
7 involve intellectual disability are many. So and, again,
8 I think where I see this as is let's divert out of the
9 trial courts these cases where, you know, these people are
10 exempt. Let's not try them as death penalty cases and use
11 all of these resources.

12 CHAIRMAN BABCOCK: Okay. Judge Peeples, any
13 comments?

14 HONORABLE DAVID PEEPLES: No.

15 CHAIRMAN BABCOCK: Rusty.

16 MR. HARDIN: Katherine, I think you answered
17 this at the very end, and I apologize for my ignorance
18 because I've been out of this world for about 25 years as
19 far as death penalty, but if the trial judge ruled that it
20 wasn't available to him and proceeds, and I believe you
21 said at the end that he can raise that same issue before
22 the jury?

23 MS. KASE: That's right, because under *Ring*
24 *vs. Arizona*, if -- the jury has the right to decide if
25 you're exempt from the ultimate punishment for some

1 reason, and he must find that fact that exposes you to
2 that ultimate punishment.

3 MR. HARDIN: Then what happens in New York
4 in your experience or maybe before the Supreme Court rule
5 that these mitigated circumstances hadn't taken into
6 effect? When you were there did it almost seem that in
7 every death penalty case if it was at all remotely
8 possible the defense would seek a pretrial hearing on
9 mental disability? And I guess where I'm leading is the
10 issue as to whether it really cuts down on resources or
11 not.

12 MS. KASE: Yeah, in my experience the cases
13 where this is raised, usually the defense has a
14 psychologist who has evaluated the defendant, administered
15 an IQ instrument, and then done an investigation into
16 adaptive deficits and whether there was onset before age
17 18. So it's ordinarily there has been defense
18 investigation. It's not just "I went to speak to the
19 client and he seemed awfully dim to me." And so that
20 sets -- puts the issue at issue.

21 MR. HARDIN: And the rule, would the rule
22 instruct the judge as to what the burden of proof was
23 going to be?

24 MS. KASE: Yes, and I would hope so, and I
25 think that once the defense had made out a -- say, a prima

1 facie case of intellectual disability, the prosecution
2 would have the opportunity and indeed the right to go in
3 and evaluate the defendant with their own expert.

4 MR. HARDIN: Would they get into
5 preponderance of the evidence or burden beyond a
6 reasonable doubt or clear and convincing?

7 MS. KASE: I think that that's a really good
8 question, and I think that that's worthy of study. I'm
9 not prepared at this time to say what it should be, but
10 again, given the Legislature's failure to act, you know.

11 CHAIRMAN BABCOCK: Richard Munzinger, and
12 then --

13 MR. MUNZINGER: I've got two questions.
14 One, it would seem to me that the accused would have a
15 right to have a jury trial on that issue under Texas law.
16 Do you agree?

17 MS. KASE: Yes.

18 MR. MUNZINGER: Two, would the state have
19 the right to appeal? Because if the state has the right
20 to appeal an adverse jury finding, there's essentially no
21 savings in time.

22 MS. KASE: Are you talking about a pretrial
23 right to a jury trial?

24 MR. MUNZINGER: Yes, ma'am. Yes, ma'am.

25 MS. KASE: You know, our pretrial rights to

1 a jury trial extend only to competence right now, so I --
2 and that is a legislative creation. So I'm not sure that
3 the defendant would have a pretrial right to a jury trial
4 on the issue of intellectual disability. I mean, I
5 suppose --

6 MR. MUNZINGER: Right. Regardless of
7 whether he has a right to a jury trial or not, would the
8 state have a right to appeal? Why wouldn't the state have
9 the -- the state of Texas have a right to appeal? A
10 district attorney and a grand jury have indicted a person
11 for capital murder, which is a specific indictment under
12 Texas law.

13 MS. KASE: Correct.

14 MR. MUNZINGER: And now the prosecutor has
15 been told, "You don't have the right to do this because
16 this fellow meets whatever standard is met," and the
17 district attorney, does he or doesn't he have a right to
18 appeal? Because if he does it's going to be two or three
19 years before the case goes to trial, and your proposal
20 seems to me to attempt to save time because it does away
21 with the individual voir dire of the jurors and you don't
22 spend two months or three months or whatever it is picking
23 the jury. Have you shot yourself in the foot by having
24 this procedure, and you're having the delay of an appeal
25 by the prosecution, unless you're going to deny the

1 prosecution the right to appeal?

2 MS. KASE: I want to make clear. This
3 doesn't remove the capital murder indictment. It just
4 eliminates the ultimate punishment, which is death. So
5 the default punishment then for this individual who is
6 still being found intellectually disabled is still accused
7 of capital murder.

8 MR. MUNZINGER: But isn't that the case
9 anyway? If you try a capital murder case, the Court of
10 Criminal Appeals -- I'm not a criminal lawyer. I've tried
11 only one capital murder case, and that was many years ago.
12 My understanding of the law at that time, which was
13 probably 25 years ago or so -- I forget how long ago it
14 was -- was that if the -- if you found a person guilty and
15 the court of appeals said, "No," he got life in prison.
16 And if that's the case, why are we going through all of
17 this because the result is still the same?

18 MS. KASE: Well, I think that, actually, in
19 answer to your question, I don't think that the
20 prosecution, if there is a determination of exemption from
21 the ultimate punishment, should have a right to appeal on
22 just the -- that failure. Now, I think that, you know,
23 certainly there are issues about Kelly and Nano, you know,
24 so I think we all are concerned about expert issues, but I
25 think that that would be sort of -- I think that would be

1 the rare case. This is about exemption from the ultimate
2 punishment, and I think that it should be noted that the
3 other thing that this will encourage is it will encourage,
4 frankly, plea bargaining and diversion of these cases out
5 of the system.

6 Because in this case -- and I just want to
7 be clear. Under 26.052 of the Texas Code of Criminal
8 Procedure, technically any case that's charged as capital
9 murder is a death penalty case, unless and until the
10 moment that the prosecution announces that it's not a
11 death penalty case. So this would only apply to those
12 cases that are death penalty cases or to those where the
13 prosecution hasn't announced, they're just leaving it
14 open.

15 MR. MUNZINGER: But it begs the question.
16 I'm no fan of government, believe me. I don't trust
17 government.

18 CHAIRMAN BABCOCK: We know that.

19 MR. MUNZINGER: I'm no fan of government.
20 On the other side of the coin, however, government has a
21 role to play in a situation where there's a capital murder
22 case. Somebody has killed a police officer, and here is
23 this police officer, he's dead, and the district attorney
24 says, "By God, the man killed a police officer and now
25 he's using his alleged mental disability as an excuse to

1 avoid the death penalty." Give that prosecutor the right
2 to appeal your pretrial ruling that the fellow is unable
3 to do so. It's a delay tactic. I think it's personally
4 -- until you persuade me to the contrary, I think you're
5 not curing the problem of delay that you say you're
6 attempting to cure.

7 CHAIRMAN BABCOCK: Okay. Holly, wants to
8 say something.

9 MS. TAYLOR: Without weighing in on the
10 merits either way of the ultimate issue that you're
11 discussing, just to point out that the state's right to
12 appeal is something covered by statute.

13 MR. HARDIN: Yeah. I was about to say that.

14 MS. TAYLOR: So that's in the Code of
15 Criminal Procedure, Article 44.01. So that's not
16 something that either of these courts could use their
17 rule-making authority on.

18 CHAIRMAN BABCOCK: Yeah, great point, Holly.
19 Thank you. Justice Pemberton.

20 HONORABLE BOB PEMBERTON: Well, I just had a
21 quick question, and forgive me if you mentioned this. Is
22 there any particular reason why the Legislature has not
23 acted in this area? I mean, is there some sort of policy
24 opposition? Or just a lack of --

25 MS. KASE: I'm no student of the

1 Legislature, but perhaps Judge Keller would have a better
2 idea.

3 HONORABLE SHARON KELLER: I think it is a
4 very controversial issue.

5 HONORABLE BOB PEMBERTON: Okay.

6 CHAIRMAN BABCOCK: Justice Busby.

7 HONORABLE BRETT BUSBY: That was the
8 question I was going to ask.

9 CHAIRMAN BABCOCK: Ah, good. Rusty.

10 MR. HARDIN: I think I shouldn't have
11 probably raised my hand. It's already been answered, but
12 Catherine Cochran and I were the ones who drafted the
13 states right to appeal passed in '87. You're absolutely
14 right. It's statutory. That statute is ripe not now
15 because of the limited rights to appeal. It doesn't allow
16 the state to appeal, wouldn't allow them to appeal this.
17 So whatever rule-making authority the Supreme Court did,
18 if the state was going to be given the right to appeal,
19 the Legislature would have to step in and give it to them.

20 Interesting enough just as a side note, we
21 discovered over a case that was disposed of in Harris
22 County -- and that's really what the state's right to
23 appeal was designed to do, was to give the state the
24 opportunity to appeal pretrial rulings of a certain type
25 that really disposed of the case, and we discovered when

1 Catherine and I looked at it we were the only -- in 1986
2 and '7 we were the only jurisdiction in the country that
3 did not give the state the right to appeal in certain
4 limited circumstances before the trial on the merits.
5 That's what it was designed to do, but I think this would
6 have to be done by statute to get the thing that you are
7 worried about.

8 CHAIRMAN BABCOCK: Yeah. Frank.

9 MR. GILSTRAP: Certainly there's nothing
10 more weighty in the law than imposition of the death
11 penalty, but having said this, I want to wimp out. I
12 can't recall since I've been on the committee that we've
13 addressed an issue of criminal procedure. As I recall,
14 the rules have come over from the Court of Criminal
15 Appeals, and we've maybe reviewed them, but I don't think
16 we've ever actually -- I can't recall debating and
17 promulgating any kind of rule of criminal procedure in
18 this committee. Maybe I'm wrong.

19 CHAIRMAN BABCOCK: Well, who knows. The
20 committee has been around since 1938, but we only give
21 advice on things that we're asked about, so should we be
22 asked on this topic, you know, we'll do what we always do
23 and then the Texas Supreme Court and the Court of Criminal
24 Appeals can accept that advice or reject it. Yeah,
25 Richard Orsinger.

1 MR. ORSINGER: I was going to raise that
2 very subject of rule-making authority. We need to look at
3 the language in the Texas Constitution, and I have done
4 this many times on this committee with the Supreme Court
5 rule-making authority, and the Legislature has generally
6 designated rule-making authority to the Supreme Court and
7 then taken it back in periods of controversy over issues
8 of controversy, but I don't think that the Legislature has
9 ever given the Supreme Court or the Court of Criminal
10 Appeals rule-making authority in the criminal area, which
11 is why we have a Code of Criminal Procedure. And so one
12 of the things I think we need to consider before we invest
13 a lot of time in this very important subject is whether
14 it's even within the scope of the power of either of the
15 courts that we help to promulgate a rule in this area.

16 Now, having said that, as a practical
17 matter, if we are the last resort, if the courts are the
18 last resort to get something done and if we were to assist
19 the courts and they promulgated a rule that prompted the
20 Legislature into taking action then that might be overall
21 good in the end that the Legislature did what they have
22 the power to do. But before we were to engage in a long,
23 no doubt difficult debate and discussion about how to
24 handle this matter, we ought to be sure that the courts
25 we're serving have the authority to even promulgate the

1 rule.

2 CHAIRMAN BABCOCK: Yeah, that's a good
3 point. We have not been asked to study this, so this is
4 deep thoughts.

5 MR. ORSINGER: I understand.

6 CHAIRMAN BABCOCK: We're just thinking
7 deeply for a change. So Roger.

8 MR. HUGHES: Well, I had two questions.
9 They were sort of touched on up to now, but the first one
10 is, is there any current caselaw guidance on the
11 constitutional -- where the constitutional rules would put
12 the burden of proof in such a hearing? I mean, is it the
13 accused's obligation to prove his incapacity, or is it the
14 state's burden to demonstrate he has the capacity?

15 The second is -- and I guess it's a
16 recommendation from you. If I recall there was a case out
17 of Ohio which went up after the Atkins, and it was in the
18 wake of I think the Ohio Supreme Court decided that they
19 would create their own rule by caselaw, and it had a
20 presumption that if the accused mental abilities fell
21 above a certain standard on -- I mean a number on the
22 standardized testing, if he was above that then it was
23 open season. That is, it was a fact question. But if it
24 was below that, the accused would be presumed to lack
25 capacity. Apparently this particular accused decided he

1 would rather take his chances in Federal court habeas than
2 go back and have the evidentiary hearing, but my point is
3 if there's going to be a -- so to speak, a rule as opposed
4 to a caselaw decision, would you recommend having any
5 evidentiary presumptions to aid solving the burden of
6 proof?

7 MS. KASE: I think that evidentiary
8 presumptions as applied to the definition of intellectual
9 disability are difficult right now. The Supreme Court in
10 *Hall vs. Florida* has said that, you know, an arbitrary
11 cut-off of 70 as the baseline IQ score for determining
12 intellectual disability is not scientifically valid. It's
13 now considering in *Moore vs. Texas* whether -- whether a
14 state can apply an older definition of intellectual
15 disability and possibly use additional factors. The ones
16 that are used in Texas are the Briseno factors for
17 determining whether an individual has adaptive deficits,
18 so I'm not -- in thinking these deep thoughts --

19 MR. HUGHES: Yes.

20 MS. KASE: -- I'm saying let's stay away
21 from that definition since the Supreme Court, the U. S.
22 Supreme Court, seems to be up to its elbows right now
23 dealing with that.

24 MR. HUGHES: Yes.

25 MS. KASE: I'm talking merely about the

1 procedure for courts handling -- trial courts handling
2 this issue in an efficient manner since the bulk of our
3 death penalty cases are urban jurisdictions that already
4 are up to their eyeballs docketwise and, again, this is
5 the major exemption beyond age from the death penalty.

6 MR. HUGHES: Well, I guess to get back to
7 the same thing, number one, has the Constitution given --
8 told us where the burden of proof lies yet, or do we have
9 any guidance? And the second, following up on your
10 remarks about presumption, how then would we -- how then
11 would you recommend we structure a threshold to get past
12 so that you're -- the accused motion would trigger the
13 right to a hearing? Because if you -- if you're not going
14 to have presumptions at the hearing to prove or disprove
15 capacity then what standards are we going to use for a
16 motion to trigger the right to a hearing in the first
17 place?

18 MS. KASE: I'm talking about quantum of
19 proof, so I'm talking about a level of proof, not just a
20 suspicion. For example, in our competency statute it's
21 not enough for a lawyer to walk into court and say, "Well,
22 he looks like he's crazy to me."

23 MR. HUGHES: Okay.

24 MS. KASE: The lawyer has to actually bring
25 forward more evidence than that to trigger a competency

1 hearing. So, again, I think that we want to think about
2 what does that lawyer have to bring forward. Is it an
3 evaluation from a psychologist or psychiatrist?
4 Traditionally psychologists do this work. You know,
5 affidavits, IQ scores. In other words, to put the matter
6 at issue.

7 CHAIRMAN BABCOCK: Judge Newell.

8 HONORABLE DAVID NEWELL: I just wanted to
9 ask maybe a very similar, kind of a piggyback on this.
10 You yourself are saying that the rule or the standard is
11 in flux. We don't really know exactly because the court
12 is wrestling with can you apply an old standard and like
13 *Hall vs. Florida* and in *Moore*, if we don't really know
14 what the standard is, unlike competency where you can lay
15 out what the standard for competency is, how can we
16 fashion a rule to address this issue when we're not really
17 going to be able to say what evidence we could or couldn't
18 look at because we don't even know what the standard is
19 supposed to be that someone is trying to meet?

20 MS. KASE: We do know the categories of
21 proof. So for those of you who don't practice in this
22 area, to be intellectually disabled according to the DSM-5
23 or the American Association on Intellectual and
24 Developmental Disability, you generally have to have an IQ
25 score that is 75 or below. This takes into account the

1 standard margin of error in the testing instrument, and
2 you must have an adaptive -- you must have adaptive
3 deficits in the behavioral, social, or practical areas;
4 and ordinarily adaptive deficits are determined by the
5 administration of another instrument to friends and
6 family, people who knew you well during the developmental
7 period, which is generally acknowledged to be before the
8 age of 18.

9 So those are two categories, and the third
10 category is there must be proof of onset of the disability
11 before the age of 18, which we -- is ordinarily found --
12 determining onset is ordinarily found by looking at, for
13 example, school records, interviewing people to determine
14 that the deficit existed and wasn't imposed by, say, a
15 head injury in a car accident at the age of 21. Because
16 someone who is intellectually disabled as a result of,
17 say, a head injury at the age of 21 or years of, say,
18 concussions through football, that manifests, say, in the
19 mid-twenties, those folks aren't exempt. This is about
20 people who had a disability that inhibited the development
21 of their brain function.

22 So we know the general categories. The
23 question before the Supreme Court in Hall was what's the
24 cut-off for the IQ score, and the Supreme Court is saying
25 there's no firm cut-off, and now the question before the

1 Supreme Court is in terms of the -- the definition, there
2 have been some changes in the general definition, but not
3 in the category. So we've always required a low IQ score.
4 We've always required adaptive deficits in some mix, and
5 we've always required this onset before the age of 18.
6 But again, we're waiting for the Court to say, for
7 example, are the Briseno factors as formulated in Texas,
8 should they properly be part of this evaluation.

9 HONORABLE DAVID NEWELL: That's right.

10 MS. KASE: But I think that, you know, if
11 we're just looking we can get into --

12 HONORABLE DAVID NEWELL: Well, I can make
13 the Briseno thing a little bit broader in that sense that
14 there isn't really any consensus among the courts in the
15 country as to whether or not we should consider the
16 offense or the elements or the facts of the offense in
17 determining adaptive deficits. If we do put that as part
18 of our definition, there might be some objection from the
19 government side on whether or not we should be having a
20 pretrial determination where we're going to develop facts
21 of an offense, where there's going to be a fact finder
22 making determinations as to whether or not certain things
23 in the offense happened before trial. That could be a
24 very big stumbling block. So if we don't really know
25 whether we're supposed to consider those things as part of

1 our definition or not, it seems very difficult to fashion
2 a rule that would require a pretrial determination.

3 MS. KASE: I would say that in response to
4 that, your Honor, the Supreme Court's been very clear this
5 is a scientific determination.

6 HONORABLE DAVID NEWELL: Oh, and they've
7 also said it's a legal determination on moral
8 blameworthiness, and that's the conflict that the court is
9 in right now. They recognize that in *Atkins*, and they
10 recognize it in *Hall vs. Florida*, and they're having to
11 wrestle with that conflict yet again in *Moore*.

12 MS. KASE: With respect, moral
13 blameworthiness is an issue as to the mitigation question.
14 It's not an issue as to --

15 HONORABLE DAVID NEWELL: No. You can go --

16 MS. KASE: -- intellectual disability.

17 HONORABLE DAVID NEWELL: -- look at *Hall vs.*
18 *Florida*. It says that very thing. You can look at
19 *Atkins*. It says that very thing. It's a legal
20 determination of whether or not the defendant is morally
21 blameworthy.

22 CHAIRMAN BABCOCK: Cam, is your office
23 handling the *Moore*?

24 MR. BARKER: We are.

25 CHAIRMAN BABCOCK: Are you doing it or --

1 MR. BARKER: Scott Keller argued that case
2 on behalf of the State.

3 CHAIRMAN BABCOCK: Can you just tell us
4 briefly what the State's position is on that?

5 MR. HARDIN: Can we hear your argument?

6 CHAIRMAN BABCOCK: Yeah, you've got 20
7 minutes.

8 MR. HARDIN: With a lot of questions in
9 between.

10 CHAIRMAN BABCOCK: Yeah, with a lot of
11 questions in between.

12 MR. BARKER: Well, I'm not sure how much I
13 can go into detail on it, but it does concern the standard
14 the Texas courts use, and one focus of the argument --
15 although there is -- there perhaps might be multiple
16 focuses of the argument -- was on what extent are the
17 Briseno factors used independently or are they simply part
18 of the adaptive deficits, part of the test. There's been
19 some question as to whether that was actually the issue
20 before the court or whether that's the issue that arose in
21 the merits briefing. So it remained to be seen if the
22 Court sees fit to address that part of the case or another
23 part of the case about which standards informed the Court
24 of Criminal Appeals definition of the intellectual
25 disability.

1 CHAIRMAN BABCOCK: Great, thank you.
2 Justice Christopher. I'm sorry, Eduardo.

3 MR. RODRIGUEZ: That's all right.

4 HONORABLE TRACY CHRISTOPHER: Is there a
5 constitutional right to a pretrial determination?

6 MS. KASE: I --

7 CHAIRMAN BABCOCK: Just off the cuff.

8 MS. KASE: Well, I think that's a good
9 question. I mean, I really do under an Eighth Amendment
10 -- under an Eighth Amendment due process analysis. I
11 can't point to a single court decision that says that,
12 though.

13 HONORABLE TRACY CHRISTOPHER: Because I mean
14 normally you wait until somebody is actually convicted of
15 the crime to which they were charged before you would
16 determine whether there was an exemption from the ultimate
17 death penalty, so, you know, so that's why I want to know
18 if there's a constitutional right to the pretrial
19 determination.

20 CHAIRMAN BABCOCK: Great point. Eduardo.
21 Sorry.

22 MR. RODRIGUEZ: This is -- doesn't have
23 anything to do with that, but it's a question about
24 dealing with the numbers of capital murder cases on the
25 docket, and it seems -- you said that they are

1 predominantly in the major metropolitan areas. Do we have
2 a procedure to -- where you have -- can have appointed
3 judges to hear those cases so that they can be moved off
4 the docket rather than stay on the -- I mean, in South
5 Texas, you know, you get a capital murder case, and it
6 goes to a particular whatever court it's going to, and so
7 that court will have to lay aside six or eight weeks,
8 depending on the matter. I'm wondering if we shouldn't
9 have a set of judges that are maybe appointed by the Court
10 of Criminal Appeals or that would do nothing but try --
11 try capital murder cases that wouldn't -- so that the --
12 so that the dockets would not be affected.

13 MS. KASE: You know, in the criminal courts,
14 unlike in the civil courts, we have no right as litigants
15 to object to visiting judges, so it seems to me that
16 that's possible. I would -- I would submit, however, you
17 might see local opposition from county leaders because
18 obviously the judges are also considering ex parte
19 requests for funding and have the authority to grant the
20 use of county monies for, you know, auxiliary defense
21 services. Virtually everyone who is charged with capital
22 murder in Texas is indigent, so you're talking about
23 potentially the expenditure of tens of thousands of
24 dollars approved by a judge who is not elected in that
25 jurisdiction, and county leaders, I'm just submitting, may

1 have some issues with that that I foresee. But it
2 certainly is something that could occur.

3 CHAIRMAN BABCOCK: Wade.

4 MR. SHELTON: I just wanted to refocus. So
5 pretrial is the question for you. In other words, rather
6 than waiting until there is an adjudication, your point is
7 let's figure it out on the front end so that we don't
8 expense all of the resources on a capital murder trial for
9 which the death penalty might be the ultimate goal, right?

10 MS. KASE: Yes.

11 MR. SHELTON: And then secondly, the
12 question you want resolved only is the measurable mental
13 incapacity, or do you -- because when you said that, as a
14 civil lawyer I'm thinking, well, we've got means by which
15 we do that, say, in a temporary guardianship or something
16 of that nature, and so it would sort of seem like you
17 could lift that, even with its preponderance of the
18 evidence type burden, over for this particular narrow
19 purpose. But then all you smart guys started talking
20 about other elements, and I'm not sure that's exactly what
21 -- if I've got the question too narrow or too broad. So
22 the pretrial hearing to save expense for judicial economy
23 for the narrow purpose of --

24 MS. KASE: Determining intellectual
25 disability, which is an exemption from the death penalty.

1 The other exemption is juvenility, which ordinarily we
2 have a birth certificate that says this person was born on
3 X date and is either -- was either 18 or older when the
4 crime was committed or not.

5 MR. SHELTON: I guess why wouldn't that be
6 somewhat similar to a temporary guardianship when you're
7 taking away a person's liberty over their estate or over
8 their person? Why would we have -- I mean, why couldn't
9 that just be transferable, so to speak, conceptually?

10 MS. KASE: I have never done guardianship
11 work, so I don't know.

12 CHAIRMAN BABCOCK: It was a rhetorical
13 question.

14 MR. SHELTON: Right.

15 MS. KASE: Great.

16 MR. SHELTON: I'm sorry. You have to leave
17 now because you didn't know. No.

18 CHAIRMAN BABCOCK: All right. Last comment.
19 Rusty.

20 MR. HARDIN: Yeah, Katherine, let me see if
21 I've got things straight here. If you're here now seeking
22 an alternative to legislative action, right?

23 MS. KASE: Yes.

24 MR. HARDIN: But you don't have the rules or
25 the rules of what your proposed drafting is about.

1 MS. KASE: I'm thinking deep thoughts.

2 MR. HARDIN: Okay. And so then assuming
3 that you submitted the request to the Supreme Court --

4 MS. KASE: Yes.

5 MR. HARDIN: -- for them to decide whether
6 to refer it to the committee, in your deep thoughts would
7 it be something that -- are you after just procedures that
8 the trial court could be guided by if they discretionarily
9 decide to have such a hearing, or are you going to seek a
10 rule that would mandate they have the hearing if there is
11 XYZ shown to them?

12 MS. KASE: The second. I would rather see a
13 mandatory rule, but I could certainly see for this body it
14 might also want to consider a discretionary rule, but I --

15 MR. HARDIN: So those of us who like as much
16 discretion as possible for judges, we would go for the
17 first, if they went to that step two or three days down
18 the line or two or three weeks down the line and brought
19 it back, but one way or the other you're going to be
20 seeking to give guidance to the trial court as to how they
21 could do it.

22 MS. KASE: Yes, and also to the litigants.
23 I think that's critical for them.

24 CHAIRMAN BABCOCK: All right. We're going
25 to take our morning break. When we come back, everybody

1 pay attention to this, we're going to hear from Dean
2 Farnsworth, but after that the committee is going to talk
3 about their deep thoughts; and as in the past, one deep
4 thought per committee member; and just so you know, we're
5 going to start with Martha. So because you're a deep
6 thinker, Martha, so we'll start with you, and since Riney
7 is out of the room we'll go to him next, and so it will be
8 great, and we can sneak up on him. So when Martha's done
9 we can say, "Tom," and he can go "duh." So we'll be back
10 in about 15 minutes. Thank you, everybody, and thank you,
11 Katherine, for coming.

12 (Recess from 10:51 a.m. to 11:08 a.m.)

13 CHAIRMAN BABCOCK: All right. We are back
14 on the record. Come on, Scott, let's go. And we are very
15 honored to have the Dean of the University of Texas Law
16 School with us, Ward Farnsworth. Dean Farnsworth and I
17 share some limited heritage. He was at Boston University
18 Law School for many years, where I graduated from a long
19 time ago, but he has done a terrific job here in Austin at
20 the University of Texas; and one thing he's going to tell
21 us about is an exciting thing, the Zaffirini Endowment;
22 and he's going to give us some additional comments as well
23 and then he's on a tight schedule so he'll take as many
24 questions as he can and then he's got to go. So, Dean
25 Farnsworth, thank you.

1 DEAN FARNSWORTH: Okay, you bet. Well,
2 thanks, everybody for having me in. Great to see some
3 friends and alumni here, and for those of you who are not
4 alumni of our school, even more grateful for your patience
5 because I can make no claim to your royalty. So I thought
6 it might be interesting to just give you a sense of how
7 things look from the law school side of the profession
8 these days. I think it's fair to say that -- and then try
9 to tie it to some of the access to justice themes that I
10 know you've been discussing and that the Chief Justice has
11 been leading so wonderfully, and it's fair to say at law
12 schools in general this is a very challenging time.
13 Whatever law school you went to, show them some compassion
14 because you've probably got a stressed out dean wherever
15 you went. It's all really driven by economics. Law
16 school has gotten considerably more expensive than it was
17 when you went. Whenever you went, it's more expensive now
18 by a good margin, and there is various reasons for that.

19 I found a wonderful letter. Some of you
20 probably know Mark Yudof, who was the dean of the UT Law
21 School a couple of decades ago, and I found a wonderful
22 letter that he wrote to all of our alumni, saying,
23 "You-all think of us as a public law school, but you've
24 got to revise your understanding. It's not like that.
25 The state provides only about 45 percent of our budget.

1 The rest is on tuition and the alumni," and I read that
2 and I think, "Oh, those were the days." Now the state
3 provides 12 percent of our budget, and the rest is on
4 students and alumni to fund, but even for non-public law
5 schools economics really have changed substantially
6 recently, over the last decade or so.

7 For one thing, applications are way down,
8 and there's sort of a chicken and egg issue there, but
9 fundamentally, as you all understand, the job market has
10 changed. Those of you all working at firms probably are
11 well aware -- I assume it's true for all of you. Your
12 summer classes for associates are smaller now than they
13 might have been 10 or 12 years ago, maybe a lot smaller,
14 and that affects the number of students who want to come
15 to -- that has a trickle down effect. It affects the
16 number of students who want to go to law school. It
17 affects the expected economic benefit of going to law
18 school.

19 So applications nationwide are down up to 40
20 percent, depending on the cohort you're in, compared to
21 say eight years ago. That's a huge drop in demand for
22 anything. I don't care if you're selling oil or widgets
23 or seats in a law school. That's a lot of drop in demand,
24 and it puts a lot of stress on schools, and they respond
25 in various ways. Some of them raise tuition for the

1 students who are able to come. Some of them let in
2 students they were not accustomed to letting in, and
3 sometimes you see that at the other end. We've had some
4 schools with serious issues of bar passage, of students
5 not being able to pass the bar, and some of these are
6 students who might not have been able to get into a law
7 school some years ago, but now they can because the
8 schools need students.

9 So you see various consequences of this and
10 I just want to -- of this economic change, the cost of
11 legal education, tightening of the job market, and I
12 really just want to comment on some consequences's of
13 this. There's consequences on the educational side. Most
14 law schools, including ours, are thinking harder than we
15 ever have before about how to prepare students to be
16 effective and valuable soon after they get out. There's
17 an old vision of law school that we don't really teach
18 them how to do anything useful. That's for after they get
19 out. We teach them how to think like lawyers and then
20 they can figure out the rest when they get into the
21 profession, and I admit that there's something about that
22 vision that I love, and we sure do try to teach our
23 students how to think like lawyers, but we don't really
24 feel we have the luxury we once did to adhere to that.

25 We think we need to produce students who are

1 much further along toward being able to help a client and
2 to add value to an employer, and so we have 15 clinics
3 over at the UT Law School. Those of you who went there,
4 you know, maybe 20 years ago might remember one clinic.
5 We have really grown our program significantly so that
6 most of our students get out having had the experience of
7 representing a real person with a real problem, which of
8 course, they find highly educational in ways that, you
9 know, the rule against perpetuities, learning about that
10 from Stanley Johanson is not, as excellent as an
11 experience as that also may be.

12 And we're also thinking in general about
13 other practical aspects of legal education, especially in
14 the third year. Financial literacy. You know, a lot of
15 people go to law school -- maybe some of you can identify
16 -- because they can't stand math. They're trying to hide
17 from math, and so they know nothing about accounting.
18 They're very uncomfortable with money. They're scared of
19 tax, and we're trying to create a curriculum that gets
20 more of our students financial literacy so they'll be able
21 to read a balance sheet and understand some accounting
22 fundamentals because we know in practice how valuable that
23 can be for a lawyer trying to help a business client.

24 At the same time, getting away from the
25 educational side then to talk about some other issues, the

1 economics of law school affects substantially who goes to
2 law school and what they feel able to do when they get
3 out, so that the change in the return on investment that
4 some students perceive, it drives some students to law
5 schools other than mine, which is an immediate parochial
6 concern for me, but also drives some students away from
7 the profession at all. I mean, it causes students to
8 hesitate before going to law school. These are people who
9 would have in the past become lawyers who would become
10 excellent public servants, and they're scared away by the
11 cost.

12 It especially in some cases has had impact
13 on minorities or students who are from families where they
14 would be the first in their family to pursue higher
15 education or a graduate degree at all. They don't have
16 the family support and resources to make a hundred
17 thousand dollars in debt sound like a feasible thing to
18 undertake, and so again, we've driven away from the
19 profession, and it affects the pipeline, and when you're
20 trying to diversify your corner of the legal profession in
21 terms of the demographics, you probably noticed that.

22 Finally, and above all, it really affects
23 what students feel at liberty to do. So we've always
24 taken great pride at our school -- many schools do, but,
25 you know, we're a public school so we think a lot about

1 this, turning out great public servants, people who want
2 to serve the public. I've always said that I think if you
3 go to the flagship public law school of the State of
4 Texas, you want to be able to afford to go to work for the
5 state of Texas when you get out; but a lot of our
6 students, again, if you come out staggering under a debt
7 of six figures, you may not feel that you have that
8 liberty. We have a lot of students show up saying, "I
9 want to devote myself to others. I want to help people
10 who need me and who can't afford the most expensive
11 lawyer"; and after they acquire the debt associated with
12 law school they think, "Gosh, I just can't. I can't do
13 that thing that I dreamt of and want to do." They want
14 to, but they're scared of being able to pay off their
15 loans, and that breaks my heart. You know, it's not what
16 I want to see. I think our mission fundamentally is
17 producing students who can go out and make a difference
18 and not just feel obliged to chase the money. I mean,
19 some students are always going to want to do that, that's
20 fine, but I want those whose heart is in public service to
21 be able to follow their heart.

22 So what -- you know, what is to be done
23 about this? We think a great deal about it, and these
24 turn into access to justice issues because we have a
25 shortage of lawyers who feel economically able to devote

1 themselves to helping those who need them the most, even
2 though they -- let's say they wish they could. More
3 people wish they could or want to do it, but I'm saying
4 even those who want to do it are having trouble finding a
5 way to do it. And part of what I think about a lot at the
6 law school is how can I facilitate their ability to do
7 that which they want to do and that which we all want them
8 to do, and so we think about strategic interventions with
9 money to make that more possible.

10 So one example is -- it's not an example
11 very large in scale, but it's an imaginative example, is
12 that one of our graduates, Carlos Zaffirini, son of
13 Senator Judith Zaffirini has created an endowment to help
14 students afford to take a bar review course who otherwise
15 wouldn't be able to. Now, you might think, "Oh, who needs
16 that when you get out of law school?" Everybody signs up
17 for the bar review course so they can learn how to pass
18 the bar. Well, everybody wants to, but if you have all of
19 this debt and you don't have family that are there to say,
20 "Oh, we'll help take care of that," you really do get
21 students sometimes, especially, I repeat, from low income
22 backgrounds, who say, "Look, I just can't be adding
23 another -- this much money to my debt that I already have,
24 plus I'm not sure I can afford to quit my new job or not
25 have a job for a month to go study for the bar exam." So

1 they don't and then they don't pass, and that becomes a
2 serious setback in their lives and their careers and it's
3 a setback for the profession in many cases because a lot
4 of these are kids who have a great deal to offer and maybe
5 they want to do good things for the public, and in many
6 cases they're minorities who have a lot to offer in terms
7 of diversifying the profession. So having a fund at our
8 law school to which students can apply and we can
9 distribute to get them scholarships to get the preparation
10 they need to get off on the right foot and enter the
11 profession, to us that's a very helpful thing and
12 something we're grateful to Carlos Zaffirini, Jr., for
13 setting up. But my point is it's a strategic intervention
14 because it's trying to target a very particular problem
15 where you have a setback. You have setbacks for certain
16 students who are at a very key moment and might not be
17 able to go forward from that moment.

18 More generally, we are often and in some
19 cases successfully trying to raise money to create
20 fellowships, post-graduate fellowships for students who
21 want to go off and do things that just aren't able to do
22 it. And that's a major issue, because you might think
23 that if they have all of this debt they can't afford to
24 take a job that pays 40 or \$45,000 a year. You know, we
25 have a lot of students who would even do that, but the

1 agencies they would work for, the Legal Aid groups, they
2 don't have the money to hire somebody to help out, even at
3 that level. So if we can provide a student with \$40,000
4 to go spend a year after graduation doing that kind of
5 work that they want to do, working for Legal Aid, often
6 that starts them into a path where they really can get a
7 paying job. They can establish themselves. They can get
8 to know people. People can see what they're able to do,
9 and a lot of those students end up with jobs and careers
10 in that area. So we consider that another example of
11 strategic intervention, of trying to fund that first year
12 out to get a student started down the path of helping
13 others and seeing what's that about and learning about the
14 satisfactions of it and gaining connections and
15 relationships that help them make a career out of it if
16 that's what they want.

17 I mean, at a minimum, as I say, I want those
18 who want to do this to be able to do it. We can worry
19 about trying to get more people to want to do it, but I
20 can't even find opportunities enough for those who already
21 know they want to do it, because there's just no money to
22 make it feasible for them to have a life like that. So
23 that is something we're working hard on, and if that's
24 something that -- and if you end up in a position to
25 encourage or recommend the state to support, you know,

1 some publicly funded limited fellowships for students's
2 not just at our law school obviously, but coming out of
3 any law school who want to do this kind of work.

4 I know in California they have this. They
5 have a public fund they've set up to finance some fellows
6 to go off and improve access to justice. I think that's a
7 great thing, and it's a great thing for the student who
8 wants to commit themselves to that. It's a great thing
9 for their clients and the state, and I think it's good
10 investment because with a little bit of help at the start
11 of the career you can get a student into that branch of
12 the profession and involve them in hopefully staying there
13 for a while.

14 So those are just some brief thoughts on how
15 the world looks from my perch, and I would be delighted to
16 pursue a little further in conversation if any of you want
17 to ask about anything I've said or raise some other
18 issues.

19 CHAIRMAN BABCOCK: Thanks, Dean. I was
20 taken by one thing you said. We said earlier here that it
21 used to be in this committee that if you raise the specter
22 of the Federal rules, that was death to whatever the
23 proposal was, and I think we've moved away from that and
24 are a little more sympathetic to the Federal rules, but
25 now it's if you say California, that is death to --

1 DEAN FARNSWORTH: Oh, maybe I shouldn't have
2 mentioned California.

3 CHAIRMAN BABCOCK: Probably shouldn't have
4 mentioned California.

5 DEAN FARNSWORTH: Okay.

6 CHAIRMAN BABCOCK: Well, let me ask a
7 question before anybody else does. I was struck when the
8 Chief told me how much the bar review course costs these
9 days. Do you have a sense of that?

10 DEAN FARNSWORTH: Well, it depends on the
11 course, but I think it could be on the order of \$5,000.

12 MR. GILSTRAP: Oh, my gosh.

13 MR. MUNZINGER: No.

14 DEAN FARNSWORTH: Okay, maybe it's four, but
15 you know, I don't know what your reaction is, because I
16 can imagine you thinking, "My God, that's so much" or "In
17 the grand scheme of things it's not that much considering
18 the stakes." I'm sympathetic to both views, but if you
19 don't have it, you don't have it.

20 And another issue I'll mention, and I'll
21 repeat this. The opportunity cost is very substantial. I
22 mean, I have the privilege of serving on a committee that
23 the Court has appointed to look at the Texas bar exam and
24 bar admissions in general and how we go about that, and
25 we're trying to think in innovative ways about how entry

1 to the bar works. And I must say, if you think about the
2 bar exam and maybe the month and a half of time it
3 consumes on the part of every law student who could be
4 gainfully employed but they're not, that's a very
5 substantial opportunity cost.

6 I mean, it's not a huge amount in any given
7 case, but when it's every single graduate of every law
8 school, it really adds up. Then you add the cash cost of
9 paying to prepare for the exam, not to mention we're
10 assuming they all pass. These are very substantial costs,
11 and in some ways barriers to entry. So we're looking
12 hard, not at California, but in states all around the
13 country and alternative ways to think about how to
14 approach this.

15 One thing we're thinking about is the
16 so-called Uniform Bar Exam, some of you may be aware of.
17 It's quite remarkable. In the last five years, half the
18 states in the country have gone from not having this to
19 having it, which is a very rapid rate of change, but it's
20 basically an exam that has general principles of law, sort
21 of like the multi-state bar exam, and once you have passed
22 it you have a portable score. You can take your passing
23 score on the Uniform Bar Exam and go practice in any state
24 that has the Uniform Bar Exam, and it makes it much easier
25 for a student to go pursue the employment market

1 nationally if they're having trouble finding jobs, which
2 many of them are. It's possible to add to the uniform bar
3 exam a state-specific component to test those particulars
4 of, say, Texas law that you think everybody really has to
5 understand, but I just mention this to you because if
6 you've never thought about the Uniform Bar Exam because
7 it's a fairly new thing, you may be hearing more about it
8 in the coming year or two.

9 CHAIRMAN BABCOCK: Yeah. I asked that
10 question, because when the Chief told me it was \$5,000, I
11 had the same reaction that Richard Munzinger had, that
12 you're kidding me. \$5,000, because that's fair amount of
13 money.

14 DEAN FARNSWORTH: Maybe some of you are
15 thinking you're missing a chance. You should be out there
16 running a bar review course.

17 CHAIRMAN BABCOCK: Exactly. Justice Bland.

18 HONORABLE JANE BLAND: Dean, do you have any
19 idea about employment rates for -- not for UT in
20 particular, but for law graduates in Texas? You were
21 talking about people not being able to find employment
22 that will service the debt that they come out with, but
23 what about just a job at all? Is the unemployment rate
24 among people who take the bar exam in Texas, what is that?
25 What is that rate? Are we keeping track of that in any

1 way?

2 DEAN FARNSWORTH: I'm so sorry, Justice
3 Bland. I can't give you a good overall state number. At
4 Texas, I think we have the highest employment rate in the
5 state for our graduates. It may be very similar to --
6 SMU's may be very similar, but the way we measure this is
7 do you have a job at graduation, but above all, do you
8 have a job nine months after graduation, because there are
9 a number of jobs you can't really even go for until after
10 you're out. So the key number for us is nine months out
11 do you have a job, and there's a whole jargon for this,
12 full-time, long-term, you know, bar passage necessary job.
13 So if you're working full-time as a barista at Starbucks
14 that doesn't count, and our rate is about 85, 86 percent
15 nine months out, and I consider that very troubling,
16 because I immediately think that's a noticeable number of
17 kids who don't have that. Now, some of them have left.
18 They don't want it. They've left the job market for other
19 things, but there are some who struggle, and that's out of
20 our school, which I dare say has the easiest time.

21 We have 10 law schools in Texas, and it gets
22 harder from there. So there are schools that have numbers
23 that are in the 70's or the 60's. I'm talking about
24 overall long-term, full-time jobs. And so we're talking
25 about many, many people graduating from law school with no

1 law job at the end of this process, lots of debt, no job,
2 and that's a real crisis. I mean, that is something that
3 drives -- that keeps a lot of deans awake at night. It
4 keeps me awake at night, and I've got less to worry about
5 than most, but I worry about it a lot, and there are a lot
6 of schools that are in tougher shape than that.

7 CHAIRMAN BABCOCK: Pete Schenkkan.

8 MR. SCHENKKAN: Well, the reference to Dean
9 Yudof and California, those references bring to mind one
10 opportunity for a story. Some of you know that Dean Yudof
11 went on to be the chancellor of the Minnesota higher
12 education system when Jesse Ventura was governor there,
13 and they shared a radio program call-in show together, and
14 eventually, Dean Yudof decided it would be easier to be
15 chancellor of the California system where there became --
16 there was a giant battle over public funding for the
17 system, and Chancellor Yudof had to deal with all of the
18 university constituents and compared his job to presiding
19 over a cemetery, a lot of people under him, but nobody was
20 listening.

21 CHAIRMAN BABCOCK: Great. Yeah, Justice
22 Brown.

23 MR. SCHENKKAN: Not very deep thought but --

24 HONORABLE HARVEY BROWN: Dean, we have on
25 the court of appeals sometimes people who will contact us

1 about the time they're getting ready to graduate, and
2 we've already hired for our paid positions, and they want
3 to come work as interns --

4 DEAN FARNSWORTH: Yes.

5 HONORABLE HARVEY BROWN: -- unpaid interns,
6 which there's problems under the Department of Labor rules
7 in having an unpaid intern who's finished law school; and
8 that's made me think about the program that we have in
9 place right now where people come in and they take a class
10 for one semester where they work for us and help with
11 opinions and cite checks, et cetera; but one semester is
12 so short that I don't know that they really get as much
13 out of it as if it was maybe more hours for that one
14 semester or if it was for an entire year, because, you
15 know, there's this learning curve until you can really
16 give somebody anything that's really very challenging. I
17 wonder if y'all have talked about extending that program
18 to either more hours or a longer period of time so that it
19 could be kind of a quasi-fellowship, if you will, while
20 they're in law school itself since we can't give this kind
21 of internship after they graduate.

22 DEAN FARNSWORTH: Yeah. Well, let me go
23 back and spend some more time on that. To me it sounds
24 very appealing. I encourage every one of our students who
25 has any appetite for it at all to try to work as a law

1 clerk for a judge after they get out. I think it's a
2 fantastic for them to continue in effect their legal
3 education as well as to do some public service, but they
4 learn an enormous amount from that role, as you well know,
5 and I would have the same reaction to somebody doing it
6 during law school.

7 We do have -- this is part of the same sort
8 of increase in clinical opportunities and practical
9 opportunities that I was mentioning. It's possible for a
10 student at UT and I think in a number of other schools to
11 get academic credit for an entire semester spent in the
12 field so to speak, working for the government or working
13 in some appropriate environment where they have intensive
14 working experience. They've got to be supervised.
15 They've got to do certain academic things around the edges
16 to make it something we can give them credit for, but for
17 a lot of them it's magnificent professional preparation,
18 and I like the sound of your idea. We'll take a look.

19 CHAIRMAN BABCOCK: Great. Yeah, Eduardo.
20 Gotcha this time.

21 MR. RODRIGUEZ: Dean, the era that law
22 schools are in now in terms of the future of students and
23 so forth, do you have an idea how long we're going to be
24 in this kind of an environment, or do you foresee us
25 getting back to what it was 10 years ago?

1 DEAN FARNSWORTH: Well, I probably should
2 turn that question around to all of you because
3 fundamentally the state of the law schools follows the
4 state of the profession. When people at firms ask me,
5 "When do you think you're going to get bigger?" I say,
6 "Well, when are you going to hire more?" I mean, the
7 reason you have this downturn in applications is students
8 correctly perceive a very tough job market, and if you-all
9 see the job market expanding greatly then I predict some
10 expansion perhaps in the capacity of law schools, but I
11 don't actually expect that particular development to come
12 any time in the near future.

13 I don't know about you, but I think there
14 have been some structural pressures on the legal
15 profession that have driven this tightening of the job
16 market that I don't see relaxing. I mean, there's some
17 things that people used to hire lawyers to do that either
18 are done by people in other countries for the firm or they
19 are done automatically. You know, when I was a paralegal
20 before I went to law school I was picking through
21 documents looking for words that can now be found with an
22 automated search in some tiny fraction of the time. So
23 there's a lot of things that -- and you have clients who
24 don't want to pay for things they used to pay for. There
25 are a lot of things that are happening that I don't see

1 unhappening that have driven this.

2 Meanwhile you've got lots of law schools.
3 It's much easier -- law schools are like wars. You know,
4 it's much easier to open or start one than to shut one
5 down, and so you open law schools when there's a lot of
6 demand, and then when demand goes down you never close
7 them. They just shrink, and we have some of that. You
8 may see some law schools -- maybe not Texas, maybe not,
9 but some law schools around the country begin to think
10 about closing. It's really astonishing that none of them
11 have. So few of them have. I shouldn't say none. One or
12 two have. I mean, when you have a downturn of 30 percent
13 in demand, you would expect a bunch of the suppliers to
14 just go away, and they don't go away. They just get
15 smaller. I mean, I think about this economically, and
16 what if all law schools were under common ownership, like
17 they were all like franchises of Starbucks or something.
18 If your clients went -- if you lost that many clients, you
19 just close a bunch, but we have sort of a collective
20 action problem where they're not under common -- each one
21 is making their own decisions. Nobody wants to go away,
22 and they all have alumni who want them to stay open, so
23 they just stay open, and in some cases they let in kids
24 who maybe shouldn't have gone to law school.

25 To come back to your question, I don't see a

1 change. I see the struggle that we're now in continuing
2 for the foreseeable future. As I said, five years from
3 now I expect law schools to be in a very similar struggle.
4 It's hard to predict anything too much farther out than
5 that.

6 MR. RODRIGUEZ: Can I follow up?

7 CHAIRMAN BABCOCK: Sure. Absolutely.

8 MR. RODRIGUEZ: Would you advise the state
9 Legislature, and -- the state Legislature, to create more
10 law schools at this time?

11 DEAN FARNSWORTH: I would not. I mean, I'd
12 ask anybody in the profession. We have 10. Do you think
13 we need more? And if you heard what I've said, most
14 people would say, gee, 10 seems like a lot considering how
15 many students are getting out with no job already and some
16 of the caliber of students that are being let in in order
17 to fill these schools. I would not. I have to be careful
18 about how I talk about this because in effect we're
19 talking about adding a competitor, and you don't want to
20 ask somebody in the business do you want more competitors,
21 but it's hard for me to imagine an argument that what we
22 really need are more law schools at this time. I think
23 there's a much stronger argument that we need fewer, but
24 I'm not going to make that argument.

25 CHAIRMAN BABCOCK: Richard.

1 MR. MUNZINGER: How much of the decreasing
2 attendance do you believe is cost related, and do you have
3 a personal opinion as to why the cost of law school
4 education has gone up so much?

5 DEAN FARNSWORTH: Let's see, a lot of it is
6 cost related. Students were greatly spooked by a series
7 of articles in the *New York Times* and then picked up
8 elsewhere. You may remember some of this from a few years
9 ago, just about the crisis of students getting out with
10 huge amounts of debt and bad job prospects. And those --
11 once that starts getting into the culture, people who
12 would just go to law school in the past because, why not,
13 I need something to do after graduation, let's go to law
14 school. Some of you might have gone to law school in that
15 spirit. A lot of people have for a long time. And when
16 law school is cheap, it's not necessarily a bad idea, but
17 when it's expensive and the job prospects are questionable
18 a lot of the students at the margin who might have gone
19 don't go. So I think it's highly driven by economics.

20 As far as why it's gotten more expensive,
21 it's a complicated question that you could ask about
22 higher education generally. I mean, any of you who have
23 kids who you have been having to put through college I'm
24 sure are flabbergasted by the cost of a university
25 education overall. At law schools in general I think part

1 of what happens is that paying faculty gets more expensive
2 because the wages in the profession go up, and you've got
3 to pull people out to get them to be professors. I think
4 -- you know, I mean, I wish I could pay my faculty less,
5 but if I do then other places hire them. There is a labor
6 market that nobody controls that affects some of the cost
7 of education, but again, this is a large conversation that
8 any university president could conduct probably better
9 than I can.

10 CHAIRMAN BABCOCK: You alluded to something
11 a minute ago, Dean, that I don't know that a lot of law
12 firms are focusing on. Some are, but that's the issue of
13 artificial intelligence and --

14 DEAN FARNSWORTH: Yeah.

15 CHAIRMAN BABCOCK: -- how law firms or
16 lawyers can harvest that to help in their practice. Do
17 you see trends in that regard?

18 DEAN FARNSWORTH: Well, I mean, I only see
19 what you-all see. Some of you probably see more of it
20 than I do. When somebody says with a great excitement,
21 "We've now hired a robot at our firm," okay, what they've
22 hired is -- what they've taken is Westlaw, and they've
23 trained it to take oral -- receive questions out loud, but
24 so I don't actually -- well, the way I tend to think about
25 it is at our law school we really want to train people to

1 do things that only humans can do. That's our motto, and
2 I think most of you probably want to do things that only
3 humans can do, and it may be that list is changing a
4 little bit because there's some things that only humans
5 used to could do, like pick through documents, that
6 computers can do faster, but I tend to think that for
7 things -- and there's no question that with LegalZoom or
8 services like that, that's another example. Some of
9 that's -- I'm not sure if it's artificial intelligence,
10 but it's use of technology to drive down the cost and
11 difficulty of doing things that people used to have to
12 hire lawyers to do, and I don't see that trend reversing.
13 I see it gradually picking up, and that's another thing
14 that's going to keep marking the job market tighter.

15 I continue to think that for those things
16 that really matter, they always require a judgment, and I
17 don't think you'll ever train a robot to show good
18 judgment. For that you need lawyers; and I don't think
19 there will never be a shortage of demand for that basic
20 thing; but at the margin I do think there are a lot of
21 things, as I said before, that firms used to have to hire
22 a number of associates to do that now they don't need so
23 many and individuals used to have to hire lawyers to do
24 they can go figure out for themselves.

25 CHAIRMAN BABCOCK: Yeah. It's hard to teach

1 a robot to think outside the box.

2 DEAN FARNSWORTH: Exactly. Can't think like
3 a lawyer.

4 CHAIRMAN BABCOCK: Yeah. Any other
5 questions? Comments? Well, Dean, thank you so much.

6 DEAN FARNSWORTH: You bet. It's a pleasure
7 to be here. Thank you for thinking about legal education
8 with me for a little while. If any of you have
9 afterthoughts or things that you would like to ask but
10 there's no time for now, I would love to hear from you,
11 whether you went to our place or not. I'm sure the dean
12 of whatever law school you did attend would be happy to
13 hear from you. We need all of the help we can get, and
14 we're listening hard in the profession to think about how
15 we could do a better job for the kids who come to our
16 school. Thank you all.

17 CHAIRMAN BABCOCK: Thank you very much.
18 Okay. Martha has been quivering in anticipation of being
19 the first person right ahead of Tom Riney to talk about
20 deep thoughts. So, Martha, one, one idea that we could --
21 we could use to improve the justice system in Texas.

22 MS. NEWTON: Well, I don't have a single
23 idea so much as an area that I hope will continue to be a
24 priority for the Court and for this committee, which is
25 access to legal services. I am one of the only staff

1 attorneys, staff members at the Court, whose information
2 is public. One of my jobs at the Court is to be an
3 ambassador to the bar, but also to the public on all rules
4 issues, and so our website says, "If you have a rules
5 question, call Martha at this number," and more than 50
6 percent of the calls that I get are from pro se litigants,
7 and they don't really want -- they don't really have a
8 rules question. What they want is legal advice, and
9 they're desperate, and most of the time I can't help them,
10 and it's very difficult because right now there's no place
11 to refer them to. They've been turned away from Legal
12 Aid. Legal Aid can only take one out of every ten people
13 who qualify, and there's nothing else.

14 The State Bar and other bar association
15 referral systems are not helpful to this group because you
16 may get an initial consultation for 20 bucks but then
17 you're expected to pay the lawyer's regular rate, and
18 there's no price transparency on what that is. So even if
19 they get a consultation they a lot of times can't proceed
20 any further. So I get these calls everyday and talk to
21 these people everyday, and I feel very proud to work for a
22 Court that is being so proactive on trying to solve these
23 problems. The work of the Commission to Expand Civil
24 Legal Services did really an extraordinary job, making
25 recommendations that I think will get the ball rolling on

1 helping to solve this problem.

2 A lot of -- through my work with that
3 committee, you know, I read a lot of the articles out
4 there. There's a lot of states doing some innovative
5 things. Some -- some have been successful. Some we don't
6 know yet. Some looks like, you know, may not make a dent.
7 A lot are controversial, but my hope is that the Court
8 will continue to push on this issue and that -- and to
9 make it a priority and that this committee will -- will
10 receive those projects with enthusiasm, and even when
11 you're working on projects that aren't specifically to
12 address this problem, generally applicable rules like, for
13 example, the civil discovery rules or other generally
14 applicable civil rules that you'll have keep this group of
15 litigants in mind and try and come up with rules that will
16 help the ordinary people navigate the civil justice
17 system.

18 CHAIRMAN BABCOCK: Okay. That's a great
19 one. You said there's some states that are doing some
20 innovative things.

21 MS. NEWTON: Yes.

22 CHAIRMAN BABCOCK: Can you give us examples?

23 MS. NEWTON: Yes, I can. So we had an
24 opportunity in August, both the full Court and then some
25 of the administrative staff like me went up to visit with

1 the Supreme Court of Colorado, and we met with them for a
2 day and talked to them about their access to justice
3 initiatives, and so one of the things -- there's this
4 concept, which Kennon will tell you about when she's here
5 to talk about the justice gap report this afternoon, but
6 there's this kind of broad concept called a navigator,
7 which means different things in different states, but
8 there are programs around the country. Sometimes it's a
9 lawyer. Sometimes a court staff person. Sometimes it's a
10 student volunteer, but their general duty is to help guide
11 pro se people through the court system and so -- and
12 sometimes they're just kind of down in the clerk's office,
13 saying, "Here's how you set a hearing. Here's what you
14 need to bring to your hearing," but other times, they
15 are -- they are actually going to the hearing, and they
16 can sit there with the person and help them respond to
17 questions from the judge. I mean, there's about a hundred
18 different models. It's very flexible. There's a lot of
19 room for experimentation, but the -- Colorado has one
20 called a SHERLOCK System, and it's an acronym, and I can't
21 remember right now what it's an acronym for, but so
22 they've started it on an experiential basis, kind of pilot
23 projects in a couple of different counties, and it's
24 essentially a navigator type program, and it's been very
25 successful.

1 And then, you know, there are some states
2 the idea of, you know, having nonlicensed people actually
3 doing some kind of legal work is very, very controversial,
4 but some states are recognizing that we at least need to
5 try some kind of program. So Washington State has a
6 program, limited licensed legal technicians, and it's
7 basically kind of like a paralegal plus type person who
8 has a legal assistant certification, but then they also
9 have to get additional training and certifications, and
10 they are authorized to give legal advice in very -- in
11 certain limited kinds of cases where there are a lot of
12 pro se litigants, and I think a lot of it is family law.
13 And that, you know, it's -- I think it's only been in
14 existence for a few years, and the first year we thought
15 it didn't work so well because there were only eight of
16 them. Now, I just checked recently, and now they're up to
17 19 in the whole state, which doesn't really make a dent,
18 but maybe in 10 years it will be more.

19 And then I think Utah has -- is
20 experimenting with that, although I can't recall the
21 details of that state's program, but other states are
22 doing some, you know, really interesting innovative stuff
23 that's controversial, but you have got to try and think
24 about it and kind of keep pushing to solve the problem, so
25 I hope that that will continue to be a focus for the

1 Court.

2 CHAIRMAN BABCOCK: That's great. Anybody
3 have any questions about this or comments? Okay. Thanks.
4 That's great. That's terrific. All right, Tom. It's up
5 to you.

6 MR. RINEY: Well, most of my thoughts spring
7 less from deep thinking than what's irritated me most
8 recently, so --

9 CHAIRMAN BABCOCK: Or the bottom of a
10 bottle?

11 MR. RINEY: Yeah. There seems to be general
12 consensus that litigation is too expensive and that
13 discovery is a big part of that, and I want to address
14 something that's pretty limited, and that is dealing with
15 discovery disputes in the trial court. Different judges
16 handle it differently, and I understand that, but, you
17 know, a lot of times what is -- and specifically the
18 problem is when you have what we'll diplomatically call a
19 difficult opponent, and we all know who they are, and most
20 of us that have had to prepare litigation budgets for
21 clients, if we've got a certain person on the other side,
22 it goes up because we know that nothing is going to be
23 worked out by agreement, we're going to be over there in
24 the trial court repeatedly, and so I think we need to try
25 to figure out maybe some best practices, if you will, to

1 deal with that type of situation.

2 We know that before we have a hearing on a
3 discovery motion that there has to be a certificate of
4 conference that we've tried to work it out. We know that
5 can be abused, particularly with the difficult lawyer, but
6 at least theoretically by the time we're standing in front
7 of the trial judge there's been some attempt to work it
8 out. There seems to be an emphasis among some trial
9 judges who, particularly after you've waited for an hour
10 or two for your turn to get up there, say, "Well, why
11 don't you go in the jury room and see if y'all can work
12 this out?" Well, you go in there. You waste another hour
13 or two. Then you come back, and then sometimes the judge
14 will say, "Well, I think y'all need to do this. You need
15 to do that." Oftentimes the judge will try to redraft the
16 other side's discovery request for them, which is
17 extremely irritating. I'm not asking the judge to redraft
18 mine. If it's no good, just say it's no good, sustain the
19 objection. We'll go on from there. It's my job to try to
20 redraft it.

21 I think we've tried to encourage trial
22 judges to do many things by agreement, and with some
23 people that's just not possible, and it would be a lot --
24 I think, a lot less expensive if many times we could
25 basically get right to the issue and have the judge rule

1 and then go on from there. I don't have all of the
2 answers to it. I don't really have any -- I have some
3 specific ideas, but what I'm suggesting is perhaps -- you
4 know, in years past there used to be a lot of seminars on
5 dealing -- for lawyers on dealing with the difficult
6 lawyer. We probably need to do some more of that again,
7 but maybe at the trial court level offer some resources,
8 get some good people together, both from the trial bar and
9 from the judiciary to come up with some types of best
10 practices in dealing with discovery disputes and offer
11 that to our trial judges.

12 CHAIRMAN BABCOCK: That's a great point. I
13 think it's become an art form almost, these certificates
14 of conference and meet and confers, and it just strings
15 things out and causes --

16 MR. RINEY: I agree.

17 CHAIRMAN BABCOCK: -- added expenses, and
18 sometimes you agree and work things out, but most often
19 you don't. There was a lawyer I was up against who it
20 took me a while to figure it out but had a tactic, which
21 was -- she was from California, and she would say -- you'd
22 say, "You know, you haven't answered this interrogatory.
23 You haven't even tried to answer this interrogatory." She
24 would say, "Oh, you know, you're right. Give me 30 days,
25 and I'll answer all of these interrogatories." So you

1 would say, "Okay, great, that would be terrific." 30 days
2 is a lot of time, but okay. And she would come back and
3 then the answer would be even more obtuse, and there would
4 be more objections, and so you would have to call up and
5 say, "Hey, you didn't really answer them any better this
6 time" and then so six months later you're still messing,
7 and at some point you -- sometimes you give up.

8 MR. RINEY: Right. And that's an excellent
9 point that I meant to mention. That's the problem. At a
10 certain point I'll just give in because I don't feel like
11 I'm going to get a decision from a judge, and so I give
12 in, and it costs my client more money just simply to try
13 to get the thing moved down the road. Why should that
14 opponent get an additional 30 days? They had 30 days to
15 begin with and they just didn't take advantage of it. I
16 mean, in the meantime all of that other expense of
17 litigation is ongoing.

18 CHAIRMAN BABCOCK: Yeah. Pete.

19 MR. SCHENKKAN: I don't do enough of these
20 cases to know, so this needs to go to you and other
21 lawyers.

22 CHAIRMAN BABCOCK: So you're speaking from
23 ignorance?

24 MR. SCHENKKAN: I am. But it seems to me
25 the question is in how that happens, why that works so

1 badly, seems to be a pretty widely accepted view that it
2 really hasn't done a lot to help. How much of that is --
3 I think that maybe Kent made the point. This is a
4 question of state court judges that just have too many
5 different things to do and not enough staff to be able to
6 manage a system like that, which really requires
7 administrative management by the judge of the lawyers'
8 activity. How much of it is that? How much of it is
9 training? Could we train the judges better in how to do
10 this and how to turn this into a tool that actually does
11 help to get to justice faster and more cheaply, and -- or
12 is there some other reason? Why does this work so badly?

13 MR. RINEY: Well, this is just my personal
14 opinion, but my personal opinion is that we could develop
15 some strategies for judges to handle it better. It's not
16 a lack of resources. It's just rule. You know, I mean,
17 I've seen some judges when they come in, they say, "Okay,
18 you signed your certificate of service. Tell me about
19 what you did first." And then when the lawyer admits,
20 "Well, I didn't do anything. I sent him an e-mail and
21 said 'Are you going to answer this' or something," judge
22 says, "Okay, fine, your motion is off the docket, go have
23 a real conference and come back." I mean, you know,
24 that's one way of handling, may not be the best, but that
25 person is not going to file another motion, set another

1 motion to compel, in that judge's court without making a
2 good faith effort to try to have a conference. That's
3 what I'm talking about, just some different strategies for
4 judges to use.

5 CHAIRMAN BABCOCK: Yeah, Roger.

6 MR. HUGHES: Well, what I have seen, and I
7 consider it somewhat of an abuse, when the judge says,
8 "Okay, I'm going to take your motion off the docket and
9 I'm going to give y'all 20 days to confer to see if you
10 can really work it out." Then what happens is all of the
11 sudden the other side is unavailable by phone, and so you
12 e-mail them, and you e-mail them with all of your
13 proposals, and you don't hear anything, and when you go
14 back, all of the sudden another lawyer from the same firm
15 shows up and talks about how the lead attorney has been
16 involved in a big trial in El Paso for two weeks and just
17 really hasn't been able to attend to it.

18 I think there -- if we're going to continue
19 with the certificate of conference, which is a good thing,
20 there has to be some give in it, because, I mean, I can
21 understand a lot of judges think, well, if you just really
22 would talk to each other, you know, what was -- what was
23 the phrase in Obama's speech? "Maybe you ought to try
24 talking to the person instead of talking over the
25 internet." I understand that, but when lawyers understand

1 if I'm just conveniently unavailable, this can gets kicked
2 down the road, I mean, I think there has to be some
3 understanding; and some judges I know will say, "How many
4 attempts did you make to get a hold of them"; and if you
5 say, "Well, I tried three days in a row and they never
6 returned my calls," they'll just go "That's enough"; but I
7 think there has to be some give if you're going to require
8 the conference.

9 CHAIRMAN BABCOCK: Okay. Yeah, R. H.

10 HONORABLE R. H. WALLACE: Well, from the
11 trial reach I think that conference is important, and I
12 can usually tell by the motion -- if it's a motion where
13 they're arguing about everything, and then you look at
14 their certificate of conference that says, "I sent an
15 e-mail and they didn't respond," then that's the same as
16 saying, "We haven't conferred." And what I do, and of
17 course, we have the facilities to do it, when they show up
18 for the hearing I'll ask them whether they really -- "What
19 have y'all really done? Have y'all really talked?" "No,
20 we need" -- "Go back there in the conference room, sit
21 down now, and see what you can agree on. What you can't
22 agree on, let the bailiff know, and I'll come back out,
23 and we'll rule on it." That way there's no delay, but
24 there's also -- and most of the time the vast majority of
25 what was on the table before they conferred, they end up,

1 you know, coming to some agreement on. It's very, very
2 rare that they just come back and say, "Nah, we're not
3 able to agree on anything."

4 I think there's value in that, but I
5 understand, and I agree with you. I don't -- I hated
6 doing discovery when I was a trial lawyer. I'm not going
7 to draft discovery as a judge. You know, i'm not going to
8 tell you what you should ask for or what your objection
9 should be. I have no trouble with that, because I hate
10 it.

11 CHAIRMAN BABCOCK: Well, there's an in
12 terrorem effect when the judge is in the next room, that
13 -- no, seriously, lawyers get very reasonable when the
14 judge is going to walk in in a minute; and that is, my
15 experience, pretty much lacking when the judge is not in
16 the next room. When you go this back and forth, I'm not
17 available type of stuff. Wade has got a comment and then
18 Robert.

19 MR. SHELTON: It just seems to me why are
20 you coming before the court in the first place, and it's
21 not always just a function of, well, because the other guy
22 won't talk to me. It's because probably lawyers are
23 depending too much on their technology and hitting print
24 on a bunch of discovery that they don't actually draft,
25 got drafted a long time ago, and it's just being tweaked.

1 And now if somebody else is receiving each and every, any
2 and all type questions and then the defend -- or the
3 responding party is hitting "push," and it's got a list of
4 the objections that we're really not supposed to be making
5 but we're still making, and so I kind of wonder if maybe
6 in our rules of procedure if we were to maybe expand, for
7 example, on requests for disclosures that you have to
8 answer, and maybe say that if you're going to file these
9 lawsuits you must answer these questions at the get-go,
10 sort of like a standing rule.

11 And then if you want to go beyond that and
12 then maybe you have to have a court hearing to allow more
13 precise or in-depth discovery, but I don't know how many
14 of you guys have been practicing trial law. You look at
15 the product of your discovery, and it's enough to fill
16 boxes from this end of the table all the way to down to
17 Judge Peebles, and you end up using about as much that
18 fits in front of Hayes here. I mean, we just stinking
19 overdo it I bet eight times, nine times out of ten; and if
20 we can constrict that then cost goes down; and we don't
21 have to worry about getting in front of a judge who hates
22 to see us on any discovery dispute in the first place;
23 and, oh, by the way, we hate seeing you guys, you know,
24 half the time. You know, at least in Bexar County we
25 don't get to see the same judge twice on our discovery

1 disputes, but you know, that's I think -- it comes back to
2 the way we practice and why we practice that way.

3 Well, we do it because we can. We're in a
4 hurry because economic pressures are on us to do it, and
5 we're really not fashioning it very often in precise
6 detail. That's probably where it needs to change.

7 CHAIRMAN BABCOCK: There is a state that
8 begins with C and is not Colorado or Connecticut that has
9 form interrogatories.

10 MR. SHELTON: Right.

11 CHAIRMAN BABCOCK: And you may not make
12 objections to those interrogatories. You can say they're
13 inapplicable; but other than that you can't make
14 objection; and there's a lot of good information that
15 comes out of that, which is not to say that the lawyers in
16 that jurisdiction do not often object; but if you go to a
17 judge, they say, "That's a form, and you can't object to
18 that," and they overrule it and order you to answer it.
19 Robert.

20 MR. LEVY: One follow-up on your discussion
21 about discovery. A study was done that we participated in
22 that showed for state and Federal cases, one page out of a
23 thousand pages produced was actually used before the fact
24 finder in terms of a summary judgment or trial. So
25 there's a lot of inefficiency, but going to your comment

1 about the in terrorem effect of having a judge there, my
2 experience has been that with judges that not only make
3 themselves available but insist that you call them if
4 there are issues or disputes before you file a motion,
5 that inevitably things get resolved and you don't ever
6 have to call the judge because nobody wants to call the
7 judge, but filing a motion is so easy, and, you know,
8 although expensive, it is much -- people are much more
9 likely to file a motion and not be deterred by the motion
10 effect.

11 CHAIRMAN BABCOCK: Yeah. Yeah. Point well
12 taken. Pete.

13 MR. SCHENKKAN: Judge Sparks at least used
14 to -- I haven't informed recently enough to know whether
15 he still does -- had the practice of saying, "You bring me
16 a discovery dispute somebody is going to be sanctioned.
17 We'll just decide which it is after I hear from you,"
18 which adds to the incentive.

19 MR. LEVY: That's a lot of in terrorem.

20 MR. SCHENKKAN: Probably overdoing it a
21 little bit, perhaps not unheard of, but maybe there is
22 something to that, is to say that that's a part of the
23 rules, is you are only entitled to bring to the judge
24 after your conference, you know, matters you have
25 conferred over, knowing that if you are not right you will

1 be sanctioned.

2 CHAIRMAN BABCOCK: Yeah. Well, to circle
3 back to where -- yeah, Judge Peebles, sorry.

4 HONORABLE DAVID PEEPLES: I agree with what
5 R. H. said about discovery being distasteful. I would
6 rather try 10 family law cases than do one discovery
7 hearing. They're just horrible, and one reason is -- you
8 know, Jimmy Blacklock alluded to bright line rules versus
9 reasonableness, and we've got reasonably calculated to
10 lead and so forth. My experience on the judicial side is
11 the cases are few and far between where there's one just
12 totally outlandish request or one totally outlandish
13 resistance to it. Usually both sides have something
14 plausible to argue under the reasonableness type language,
15 which makes it hard for me to make a good decision and
16 then hard to sanction it, and of course, you can't just
17 sanction right off the bat.

18 So I think that's one of the problems, and
19 something else, back in the Eighties we went from a motion
20 to produce documents, you had to show good cause. You at
21 least had to go to court and convince a judge if you
22 didn't get an agreement. We went to the request for
23 production, which requires -- puts the burden on the
24 resisting party to whittle it down. I think that needs to
25 be reconsidered. I mean, that was a sea change it seems

1 to me and I -- there ought to be some discussion of it
2 because that right there, just ask, you're not going to
3 get whacked. The other side has the burden to whittle it
4 down, and the judge has a hard decision because of the
5 weaselly standards. And I would say again, if you were to
6 list the 25 most common things trial judges do and let me
7 rank what I hate the most, discovery would be number 25
8 for this reason.

9 CHAIRMAN BABCOCK: Yeah, and that's -- at
10 least my experience, the request for production, that's
11 where all the expense is, getting the documents. That's
12 where all the expense is, and they're not limited under
13 our rules. You can ask as many as you want, as many sets
14 as you want, and very expensive, but going back to Tom's
15 original point, the -- this certificate of conference meet
16 and confer thing is something that maybe deserves some
17 attention, along with all of the other things that we've
18 talked about.

19 We're going to take a lunch break right now,
20 and we'll come back with more deep thoughts, so everybody
21 be thinking of them. It might take us a minute or so to
22 get around this room, and Kennon will be here at 2:45 to
23 talk on the Commission to Expand Civil Legal Services,
24 which I think is very important work. So we'll be in
25 recess, and thank you.

1 (Recess from 12:02 p.m. to 1:01 p.m.)

2 CHAIRMAN BABCOCK: It's been pointed out to
3 me that we've got to get on our stick. So, Professor
4 Hoffman, you're next. What? Huh? Who, me?

5 PROFESSOR HOFFMAN: I was thinking about it,
6 and I think that it works out well that I'm kind of right
7 after Martha and Tom, because I think in some ways the
8 remarks I want to give are kind of a synthesis of those
9 two. So I think my main thought that I wanted to throw
10 out is I, as you know, think we have a problem with
11 discovery; but unlike the view that is sometimes
12 expressed, including expressed earlier today, I don't
13 think it's a problem across the system; and so that's why
14 I applaud and think that we're moving in the right
15 direction with the subcommittee, the discovery
16 subcommittee that Bobby is leading, in thinking about
17 continuing to handle different cases differently so that
18 we can truly address the problem cases in sensible ways,
19 through rule reform, through trainings, through education,
20 through promulgation of forms, et cetera, while not
21 hurting or otherwise messing up the vast majority of cases
22 that are functioning just fine.

23 So that's kind of -- again, I'm repeating
24 what I've said before, but that's a first thought that I
25 had, and that leads me to again kind of double down on

1 what Martha said. I hope that as a deep thought the Court
2 will keep in mind kind of keeping its eye on where the
3 important systemic issues are. In other words, we need to
4 deal with discovery for the problem cases, but where the
5 problems that really cut across the system are, are the
6 access to justice issues; and that's why like if you read
7 page one of the Justice Gap Commission's report, the
8 numbers are startling. It's like more than 90 percent of
9 people who have a legal problem -- right, they go out and
10 they survey people and they say, "If you don't have a
11 legal problem you've already" -- but if you've ever had a
12 legal problem, 90 percent of them have had no contact with
13 the court whatsoever, and then even among that group
14 something like less than five percent have even consulted
15 a lawyer. So we're talking this is the universe; and this
16 isn't just the abject poor, as Chief Justice Hecht said, I
17 mean, this is much of the state; and so keeping our eye on
18 that's where much of our efforts and energy and thinking
19 ought to go.

20 So, again, I'm really not saying anything
21 new that Martha hadn't said or even Tom kind of alluded
22 to. I'm not disagreeing with Tom or the other comments.
23 I just want to make sure we kind of keep them in
24 perspective. That's the deep thought I wanted to --

25 CHAIRMAN BABCOCK: Good. An excellent deep

1 thoughts. Anybody have any deep thoughts about his deep
2 thought? All right. Richard, you're a deep thinker.
3 God, we have a killer's row of deep thinkers here.

4 MR. LOW: Look what he's got written down.
5 You're going to be here a while.

6 MR. ORSINGER: I'm just going to hit the
7 high points.

8 MR. FULLER: I would like to point out that
9 I'm sure on that list is my deep thought somewhere.

10 CHAIRMAN BABCOCK: I was going to say, the
11 ground rules are if somebody has taken your deep thought,
12 you've got to come up with another one.

13 MR. ORSINGER: No dittos.

14 CHAIRMAN BABCOCK: No dittos.

15 MR. ORSINGER: Okay. So I just had six
16 thoughts that are interrelated.

17 CHAIRMAN BABCOCK: Six interrelated deep
18 thoughts.

19 MR. ORSINGER: So we call it one complex
20 thought or six simple thoughts.

21 CHAIRMAN BABCOCK: Well, you may be right.

22 MR. ORSINGER: I think one of the challenges
23 for this committee is that we are asked frequently to
24 design rules of procedure for complex cases, which
25 represent, I'm guessing, at most 10 percent of the docket,

1 with a rule that applies to the other 90 percent of the
2 cases, which are simple cases; and that is a struggle to
3 balance how to handle the most complex without unduly
4 burdening the simple litigation or how to keep the tail
5 from wagging the dog; and I didn't know Professor Hoffman
6 was going to say this, but we've done a little bit of dual
7 tracking in the last decade or so; and it's looking like
8 it might be a good idea. And perhaps we should be more
9 serious about the idea of allowing people to opt into a
10 complex system that looks more like a Federal system or to
11 opt into a state system or default into a state court
12 system that doesn't require as much pretrial and you can
13 kind of just show up and call your witnesses and see who
14 wins.

15 The second point I wanted to make is as you
16 make procedural processes more complicated, you make them
17 more expensive, and you make them more difficult for
18 unrepresented litigants to litigate. So while we might be
19 able to with our collective intellects to come up with
20 really nice, fitting, complex procedures for people that
21 can't afford lawyers that can keep up with it or lawyers
22 at all, we're making it harder for them to access justice.
23 So I think as a principle, I know we've done this in the
24 past, that every time we consider a procedure we should
25 ask what are we trying to accomplish and what is the

1 simplest way to get that done. Even though we might have
2 done it a different way for a hundred years, is there a
3 simpler way to get to the same end, and I don't think we
4 ask that question enough. I think we're too influenced by
5 the existing practices and the ones we're familiar with.

6 The third point on unrepresented litigants
7 is there are two things to me that would really help them.
8 One is simplified pleadings, and there are certain places
9 in this country where the name cannot be mentioned that
10 actually has a petition that's a checkbox and has a
11 checkbox for different kinds of claims, and if it's not
12 checked, it's not included in the pleading. If it is
13 checked, it is. That is your petition, and that is your
14 response, and you can get those off of the internet.
15 They're all government sponsored, and I don't know how
16 well it's going, but I think it's going well, and I've
17 been impressed with the simplicity of a family law
18 self-represented person who wanted to conduct a divorce,
19 with or without children, with or without property, to
20 just be able to take a form that was promulgated by their
21 Supreme Court, God forbid, and check off the boxes that
22 you want and on the front and the backside.

23 CHAIRMAN BABCOCK: Everybody was in favor of
24 those forms, right, as I recall?

25 MR. ORSINGER: Yeah, everybody was, right.

1 CHAIRMAN BABCOCK: That's what I recall.

2 MR. ORSINGER: And then to go along with the
3 simplified pleadings is standardized discovery, and by
4 standardized I mean something along the lines of a request
5 for disclosure, which I think has been a tremendously
6 successful effort to simplify things. Lawyers don't bill
7 their clients as much. It gets a lot of basic information
8 out. I think it's been a 1,000 percent success. We could
9 introduce requests for disclosure into different practice
10 areas, like medical malpractice, automobile accidents
11 litigation -- collisions they call them now -- family law,
12 and they are more tailored; and if you're in that category
13 of case, you have the right to send this request for
14 disclosure and you can't object to it. And we might even
15 consider to some limited extent having a standardized
16 request for production that goes along with the request
17 for disclosure so that there can be no objections and if
18 it's requested then you've got to produce those. So the
19 standardized discovery would help the pro ses, but it
20 would also help keep the price of litigation down because
21 lawyers wouldn't have to draft as much and wouldn't be
22 able to charge for the drafting.

23 The next point I wanted to make, which is my
24 fourth one for those of you who are counting --

25 CHAIRMAN BABCOCK: Waiting, actually.

1 MR. ORSINGER: Medical expenses are
2 completely out of control, but based on the complaints
3 that I hear, it's not because doctors are making more.
4 Doctors are making less, they say. I think it's other
5 things that's making medical expenses get out of control,
6 but one thing I've noticed as a user of medical services
7 over my lifetime is that I've gone from an environment
8 where I always saw a doctor for everything, unless he left
9 the room and I got a shot from the nurse; and now I go in
10 and I spend an hour waiting, and then I spend 10 minutes
11 with an assisting professional and two minutes with the
12 doctor. And I don't know if that's the best way to do it,
13 but that's the way they're handling those costs, and I've
14 talked to nurse practitioners and to physician's
15 assistants, and they -- the ones I've talked to, they have
16 six-year degrees. They have nursing degrees, plus, plus,
17 plus, and they're able to deliver a lot of medical
18 services that in the old days only doctors could do and
19 now apparently we're able to deliver medical services.
20 Maybe we could look at that paradigm and see to what
21 extent we want to implement it in the law.

22 Then my fifth point is one of the
23 difficulties in reducing the cost of representation is
24 the -- what is what I call the scope of the lawyer's
25 engagement. One of the theories behind reducing legal

1 fees has always been to have limited engagements with
2 lawyers that are responsible just to do X, and they're not
3 responsible to see if Y and Z are done. So you could be
4 hired just to draft the paperwork that the parties agree
5 on is a settlement without looking behind it to find out
6 if it's a wise settlement or whether there may be some
7 enforcement problems down the road.

8 Well, limited engagement doesn't work. The
9 ethics rules are kind of antagonistic to it, and the legal
10 malpractice rules are if you're in for a penny, you're in
11 for a pound, that if you sign on as a lawyer and you draft
12 that document that the way you're told and you didn't tell
13 them that this might be true, you'll get sued for
14 malpractice later. So maybe some changes in the law or
15 changes in the procedures or ethics rules regarding
16 limited engagement might work.

17 And the last point I wanted to make is that
18 more governmental assistance for pro ses is probably going
19 to be a key factor in helping solve the problem, and I'll
20 hold up the example of Bexar County as an example. We
21 have a civil staff attorney that is an individual lawyer
22 who assists all the civil judges, but she runs a clinic
23 sort of or an area that has law students from St. Mary's
24 that help her, and before you can take a judgment pro se
25 in Bexar County you have to get her approval or her

1 staff's approval, and they look at your pleadings and they
2 look at whether the deadlines are all met, and they look
3 at your judgment and tell you whether your judgment is
4 right or not, and if you don't have their seal of approval
5 you don't get your judgment signed if you're a pro se. I
6 think I'm saying this right, David, aren't I? That's been
7 my experience.

8 HONORABLE DAVID PEEPLES: Well, basically,
9 yeah.

10 MR. ORSINGER: Let me tell you how
11 aggressive they are in San Antonio. We have a huge
12 military population that is able -- they are overseas, but
13 they can file for divorce in Bexar County. Our staff
14 attorneys handle divorces for petitioners who are in Iraq,
15 based on pleadings that they send in, that they're vetted
16 and they're corrected and then they prove it up without
17 either party appearing based on interrogatory answers that
18 they just submit voluntarily. It's all kind of irregular,
19 but, you know, it really works. The important thing there
20 is that they're staff people. They work for the
21 government, and they're immune from being sued for
22 malpractice. So I think that last solution is going to be
23 an important solution and that people ought to look and
24 see how they do it in Bexar County, and that is my list.

25 CHAIRMAN BABCOCK: How much does that cost?

1 MR. ORSINGER: Nothing. It's free. The
2 only difficulty is --

3 CHAIRMAN BABCOCK: How much does it cost
4 Bexar County?

5 MR. ORSINGER: -- you have to make an
6 appointment to get in to see one of the lawyers or one of
7 the interns, and it might be as long as three or four
8 months to get in to get the appointment, but it is no
9 charge, and they will tell you how to change your
10 pleadings. They will tell you, you know, that you can't
11 get this relief or rewrite it this way; and they really do
12 help these people get through even complex situations
13 involving minor children and Federal benefits and that
14 kind of thing.

15 CHAIRMAN BABCOCK: How much does it cost
16 Bexar County?

17 MR. ORSINGER: I don't have the answer to
18 that question. They have one full-time staff lawyer, so
19 that's going to be 80, \$90,000 a year. They've got part
20 of the courthouse that they set aside. I don't know how
21 many paid employees there are, and then they bulk up their
22 staff by free interns from St. Mary's Law School, which by
23 the way, is a great way to get practical experience
24 interviewing people and finding out their problems and
25 drafting pleadings and going down there while they do a

1 prove-up.

2 MR. SHELTON: So there's a bit of a
3 bottleneck on that, though, because you don't get to go
4 appear without it being approved. So you get the backup
5 on the approval piece. So what will happen, at that point
6 a lot of those pro ses would then go to a lawyer and say,
7 "Here I am, can you help me?" And Richard's right. I
8 mean, you want to be careful about liabilities, but you
9 still come -- I mean, it comes to a lawyer at a time where
10 there is a brief involvement in proving -- in working to
11 prove up, and so that kind of helps, too. It kind of
12 moves things along a little bit.

13 CHAIRMAN BABCOCK: Chief Justice Hecht.

14 CHIEF JUSTICE HECHT: I'd like to get Dee
15 Dee to type that up, and we'll put it on the Court
16 website. We'll send it over to the State Bar and see if
17 they'll put it on their website.

18 MR. ORSINGER: Especially the part that
19 talks about check the box forms approved by the Supreme
20 Court, and that was just a -- just a fanciful thought on
21 my part.

22 CHAIRMAN BABCOCK: Yeah, Richard.

23 MR. MUNZINGER: I may have missed it,
24 Richard. Are there financial parameters or indigency
25 requirements for people to use these pro se services in

1 Bexar County?

2 MR. ORSINGER: No. If you're pro se, you
3 can use them.

4 MR. MUNZINGER: So the government is
5 providing pro se legal services in competition with the
6 local bar of San Antonio?

7 MR. ORSINGER: You know, they are, but
8 Richard, the problem is, is that the level of -- the
9 people that are getting that service are not -- often not
10 able to pay anything or not pay very much.

11 MR. MUNZINGER: Well, but that was my
12 question, are there indigency requirements?

13 MR. ORSINGER: No. No, there are not.

14 MR. MUNZINGER: And what is the objective,
15 empirical evidence that you base your comment on that they
16 can't afford it? Their verbal statement?

17 MR. ORSINGER: Just looking at them and
18 watching in operation.

19 MR. MUNZINGER: I'm not opposed to providing
20 indigent legal services, but I think you need to take a
21 look at saying the government should provide divorce work.
22 We just had the dean say people can't find -- they can't
23 make a living practicing law or they can't find jobs, so
24 Bexar County is giving away free divorces. I think I'll
25 go move to Bexar County.

1 CHAIRMAN BABCOCK: Judge Peeples.

2 MR. MUNZINGER: Maybe they give away free
3 housing services, too. I can get a deed done for free.
4 That's what lawyers do for a living.

5 CHAIRMAN BABCOCK: And you have a buffer
6 between Mr. Munzinger and yourself, so feel free to say
7 whatever you want.

8 MR. MUNZINGER: I just wanted to ask the
9 question whether it was limited to indigence or not, and
10 it obviously is not.

11 CHAIRMAN BABCOCK: Yeah.

12 HONORABLE DAVID PEEPLES: I want to thank
13 Richard for a very helpful list there, and I want to ask
14 him, you know, what percentage -- I guess everybody -- of
15 the need for help is family law and what percentage is
16 something else? Don't you think it's just overwhelmingly
17 family law?

18 MR. ORSINGER: I don't ever see anybody down
19 there pro se in anything but a family law case.

20 MS. HOBBS: Landlord-tenant.

21 MR. ORSINGER: Landlord-tenant? Okay.

22 HONORABLE DAVID PEEPLES: Well, but
23 landlord-tenant mainly happens in the JP courts. You
24 know, but it's almost all family law. They're just
25 overwhelmingly, and one thing I'm going to do, I'm on this

1 committee -- and I think you are, too, Richard -- that's
2 going to be looking at the court patrons or whatever it's
3 called, but I think the Bexar County experience is
4 helpful. Just from the judicial side -- you know, and,
5 Richard Munzinger, I hear what you've voiced, some real
6 concerns, but from the judicial side, the people are there
7 anyway. If you were to wipe out this office tomorrow,
8 they would still be there, and they always have been, more
9 numbers more recently. Pro se people who for one reason
10 or another have not hired a lawyer, and it's almost always
11 family law. 99 percent. It's way up there.

12 And so as a judge, I mean, the case is
13 there, and so you've got all kinds of things to do, but
14 you've got to check that file, do they have service, can
15 they get a default judgment, has everybody been notified
16 that needs to be, are there children, did you take care of
17 the children, and so forth. There are issues like that,
18 and you're being asked to grant a divorce or make -- give
19 some relief and sign something, put your name on it, but
20 you've got to make sure it was done right. And so this
21 staff attorney, one of her main duties is to be sure that
22 before they get to me all of the boxes have been checked
23 or loose ends tied up, and it needs to be done.

24 So, now, is the private bar not going to
25 like this? Yeah, they've acquiesced in San Antonio

1 because these are not paying cases, but I think that what
2 Richard Munzinger raises, there will be resistance, but I
3 agree with Richard Orsinger that government-funded helpers
4 like this is probably going to have to be done, and is it
5 going to be done in all 254 counties? No, but the bigger
6 cities I think will have it, and the need is just there.
7 Are they practicing law for people? No, but they're
8 making sure that things that need to be done, especially
9 when it's family relationships and children, gosh, how big
10 of a stake do we have in that? And so to me that's the
11 kind of thing that Richard is voicing, which I think one
12 of the items in the Chief Justice's letter asks us to go
13 there. Name changes, there are just all kinds of things
14 like that that people -- "Where do I go to do this," and
15 they're going to be asking a judge or a clerk if the staff
16 attorney is not there, and it's a great way for the law
17 students to be of great help, too.

18 CHAIRMAN BABCOCK: Eduardo.

19 MR. RODRIGUEZ: Yeah, I understand the
20 comments, and I applaud Bexar County for what they're
21 doing, if there's any thought of expanding this I would
22 hope that the State Bar would be brought in from the very
23 first so that they could be a part of the -- of the
24 discussion so that we don't go through what we went
25 through three or four years ago and have a major fight

1 with the -- with the bar. I just ask that they be brought
2 to the table as well so that -- so that the other side can
3 be heard as well.

4 CHAIRMAN BABCOCK: Yeah. All right.
5 Thanks, Richard. Great thoughts. Deep thoughts. Buddy,
6 it's to you.

7 MR. LOW: Well, I told Richard, I've been
8 accused of a lot of things, but deep thought is not one of
9 them, and I will tell you one thing. After I'm talking
10 you will still not accuse me of it. So with that said, I
11 have joined a number of people -- like Royal Furgeson has
12 written this great article about the dwindling right of
13 trial by jury, and what is -- I mean, what do we have as
14 lawyers a right to do, what is it that should be done by
15 others that are nonlawyers, which was raised earlier this
16 morning, and we raise about cost of things. Well, the
17 rules are only one of the elements of cost, and as Richard
18 said, we try to write rules one size fits all, but the
19 question is and was raised earlier what should this
20 committee be doing? What is our job, merely to look at
21 rules?

22 Now, the Legislature has told Richard and me
23 years ago not to mess with legislative and deal only with
24 rules, but should we go beyond that and make
25 recommendations on other things that would increase or

1 help the justice system that aren't just rules? Rules are
2 only one element of it. Should we go beyond and make
3 recommendations? Should we study? Should we look at what
4 other states do? And one of the evidence rules, I got
5 some Baylor students to do research on what every other
6 state is doing. Should we look beyond that, or should we
7 just look at the words and see how we can amend our rules
8 to make them better? And that's the only question I have.

9 CHAIRMAN BABCOCK: Okay. That's a deep
10 thought. Wouldn't everybody agree? You're going to be
11 accused of deep thinking.

12 MR. LOW: It would be a first time.

13 CHAIRMAN BABCOCK: Roger.

14 MR. HUGHES: Well, I want to chime in on a
15 couple of things that was said earlier and then get to my
16 deep thought for the day. The first thing about access to
17 justice, I think what is troubling people is not getting
18 access in getting to the courthouse. It's providing the
19 unrepresented legal -- the unrepresented litigant with the
20 equivalent of legal advice, counsel, and advocacy; and the
21 first thing -- and I said it before when this whole
22 question about forms instead of counsel, et cetera, was we
23 not -- and somebody else used the phrase that we not
24 create a two-tiered system of justice; and then I think a
25 phrase I used was these people want access, not being

1 processed. That is, these people get in and then what do
2 they get? Well, they get their case decided. Not
3 necessarily correctly, not necessarily as well as if they
4 had a lawyer, but their case is out the door; and that's
5 maybe all the system really wants.

6 And so if we're going to say what these
7 people need is some kind of legal direction or assistance,
8 well, there's no free lunch; and if -- and in the case
9 that was talked about by Justice Peeples, it means having
10 a staff attorney to check the paperwork instead of a
11 lawyer, an independent lawyer who is representing counsel,
12 well, the government is going to have to pay for that.
13 And if we have to have law -- pardon me, staff on
14 providing minimal legal advice to people about you
15 shouldn't have filed this form, you should have filed
16 that, and your petition ought to say -- have these
17 additional allegations to be sufficient, or whatever,
18 well, once again, somebody has got to pay them to do that,
19 and we're going to have to have additional staff to do
20 that. Are we really going to -- somebody is going to have
21 to pay for it.

22 The other thing is, and I think it was
23 mentioned earlier. In fact, I think it was even in the
24 study paper, start studying the patterns of where are the
25 pro se litigants. I think we're always going to have the

1 pro se family law cases. I think that's just a given, and
2 regretfully, I think that's probably going to be steady.
3 But I think the other pro se areas may come and go with
4 our economic woes. I mean, after the housing market I'm
5 sure we were inundated with the foreclosure cases, but
6 maybe those are behind us. The same thing goes for when
7 we have economic downturns. All of the sudden we're going
8 to have a bunch of small debt collection and credit card
9 cases. Is that an issue we need to deal with, or do we
10 just weather this storm and not have to worry about it
11 again? So I think information could be very helpful.

12 The second thing, and it was said if we're
13 going to allow nonlawyers to provide some legal services,
14 I think we've all recognized that they're going to have to
15 be regularized, trained, and educated. In the medical
16 profession, if you ever go through the occupation codes,
17 there's a number of health care related professionals
18 besides doctors. It just goes on for chapter after
19 chapter, but they all share the same thing, that they have
20 to have a certain amount of education, a certain amount of
21 certification, usually involves licensing and testing. I
22 think if we're going to have nonlawyers -- that is, people
23 without a J.D. -- provide legal assistance to people at
24 reduced costs, we're going to have to do the same thing.

25 I don't think we can just say we're going to

1 train these people and hope, because, I mean, we've
2 already -- we've already been through in my neck of the
3 woods problems with nonlawyers providing legal services,
4 and people would hang out a shingle as a notary, and
5 people would think they could actually prepare legal
6 documents, and unfortunately several of them had to go to
7 jail because the one thing they did -- they not only did,
8 was that they knew what was on the forms. They also
9 understood after a while that a lot of these forms
10 couldn't be corrected except with maybe slipping some
11 money under the table to the public official who had to
12 provide the service. And so, like I said, if you're going
13 to have these legals (sic) providing legal services,
14 especially in the area of preparing legal documents, I
15 think it's critical they have some sort of licensing or
16 training.

17 Now, to get to my deep thought for the day
18 is for the past year I have -- I have bemoaned what I call
19 the low level of public discourse, and I'm afraid if it
20 hasn't it soon will seep over into the legal system, and
21 the first one is what I call the almost complete
22 disappearance of civility in public speaking, and I'm not
23 just talking about the debates. I'm talking about what I
24 saw when I turned on the TV and watched national news
25 programs, and I watched people with college degrees and

1 years of experience degenerate into shouting matches of
2 the lowest level that I used to think was confined to
3 reality TV in the afternoon. People -- once again, people
4 that at one time I would have call respected public
5 officials or respected news commentators try to shout each
6 other out, call each other names, call each other the
7 lowest names that you can say on TV without getting fined,
8 and then we're going to expect that people -- that the
9 lawyers we're training today are going to come into court
10 and behave the same way and that they're going to show
11 judges any more respect than people who appear on national
12 TV show to news commentators.

13 I think we're in serious trouble on that,
14 and I think it's going to have to start with training --
15 going back to -- and we didn't get this much training,
16 even at UT when I was there -- about how to behave -- how
17 to speak in public and how you conduct these debates and
18 how oral argument is supposed to go and what you can and
19 cannot do and then be held accountable.

20 The second thing of it is, is part of the
21 low level public discourse, which again, I'm afraid is
22 going to slop over into the courtroom, and that is the
23 almost complete abandonment of the need for factual
24 support for a statement. A Federal judge was accused,
25 publicly accused, of letting his heritage interfere with

1 his judgment; and the accuser felt almost -- in my
2 opinion, and many of the people who joined in this felt it
3 was unnecessary for them to support the accusation,
4 leaving aside the whole idea of one of our bedrock ideas.
5 If you make a statement, you have to back it up. That is
6 beginning to disappear. The idea that you actually have
7 to have some facts and that you ought to be able to point
8 to them is beginning to disappear.

9 Again, I think it's important in law school
10 and for lawyers to set the standard, not just to make
11 statements and say it's up to you to disprove it. I don't
12 have to come up with facts. I don't have to point to
13 actual objective sources to prove anything I say. I mean,
14 I can remember one of the great insights I ever got for
15 brief writing was from Justice Keltner. He said every
16 sentence needs to end with either a record cite or a case
17 citation. If you don't do that, don't write it. I'm not
18 sure I've quite lived up to that, but I remember it as a
19 pretty good standard to live up to.

20 And the third one -- and maybe I'm just the
21 wrong generation. Once again, the dis -- you know, the
22 disappearance of the idea of -- that there is anything
23 like the objective world; and what I mean is, is the -- to
24 use the word of the day, fake news. I was shocked when I
25 listened to a news program of a commentator said they

1 surveyed a lot of people who, quote, "get their news from
2 social media" and they were un -- and the people who,
3 quote, "got their news from social media," et cetera, they
4 were unable to explain what they thought news was. They
5 did not think news was reporting information for your --
6 to educate you. For them it was strictly entertainment
7 for which the truth or falsity was absolutely irrelevant.
8 I think it was important that I -- once again, for lawyers
9 to set the trend that we have some regard that there is
10 objective information, and we're to provide it, and that
11 there is something called facts and news and having it is
12 important and not having it is to be despised.

13 And, again, I think this is going to start
14 in law school. It's going to have to be something that
15 are emphasized by lawyers, especially with the public
16 because now a lot of -- all of our oral arguments in the
17 Supreme Court are available over the web. Our clients
18 watch them. I imagine some people in the public watch
19 them, and we have Court TV and we have lots of news
20 programs that will show clips from the courtroom. I think
21 it's important to start setting the tone that it's not
22 enough to say it. You have to prove it, and that means
23 pointing to something more than just what you wish was the
24 truth. We have to set the tone, or we're going to start
25 seeing in courtrooms what we watched on all of the news

1 programs last year, and I don't mean just from one side.
2 Both sides seem to be the same thing.

3 CHAIRMAN BABCOCK: All right.

4 MR. HUGHES: And maybe that's something for
5 judges to be concerned. Maybe it's something about law
6 schools to think about.

7 CHAIRMAN BABCOCK: Court TV is now called
8 truTV.

9 MR. HUGHES: I rest my case.

10 CHAIRMAN BABCOCK: Just a little footnote.
11 Lisa.

12 MS. HOBBS: So I guess I want to preface my
13 statements with I am a Pollyanna, and so I always see the
14 best in the situation, the best in people. I try to see
15 both sides of every situation.

16 CHAIRMAN BABCOCK: So you're a good
17 counterpoint to Roger.

18 MS. HOBBS: I might be.

19 MR. HUGHES: And we sit next to each other.

20 MS. HOBBS: But I'm sad to say that my deep
21 thought is what I think is perhaps a crisis or a potential
22 crisis of perceived bias in the judiciary. I've been
23 talking -- it just seems like this has come up with a lot
24 of conversations I've been having with people; and as an
25 appellate lawyer I get to represent both sides of the bar.

1 I have as many plaintiffs cases as I have defendants
2 cases. I do probate cases, family law cases. I can't say
3 I -- I mean, it's going to be a significant amount in
4 controversy for me to be involved maybe, so maybe I don't
5 have a great view of the world of litigation, but I think
6 I get a pretty diverse view anyway as an appellate lawyer.
7 And, Justice Hecht, I loved what you said earlier today
8 that I'm not going to say as eloquently as you did, but
9 the judiciary is founded on trust; and if we lose trust in
10 the judiciary both as a bar and from the public then I
11 think we're on the wrong road.

12 So I guess there's a big topic that I think
13 this is playing into, but I think there are smaller topics
14 that this plays into. One, I think there needs to be real
15 soul-searching on the part of the judiciary in their
16 rulings as to whether there is some sort of inherent bias
17 that -- I know judges don't sit around and think like, oh,
18 I'm ruling this way for, you know, this reason; but we all
19 have our own biases, whether we're -- if we're really
20 honest with ourselves. I think for us here in this
21 committee I think one of the things we need to think about
22 as we make significant changes to procedural rules is,
23 one, recognizing our own bias, too, but making sure that
24 the rules we pass really are fair, that we step outside of
25 our own experience and our own practice and really ask

1 ourselves is what we're doing right, are we really making
2 an efficient system, are we really making a system that
3 works for all of the litigants in the system. And it
4 requires a lot of soul searching and honesty with
5 ourselves to really get rules that I think work for
6 everyone.

7 And then, finally, I think that as a state
8 we have to address judicial selection. I think part of
9 the crisis of, you know, this bias in the judiciary is
10 because we elect our judges. I think, you know, this
11 comes up all the time, and a cynic would say we'll never
12 get it done, but like I started this conversation, I am a
13 Pollyanna, and it's a flawed system, and I hope Texas does
14 something about it. One small step that I think is going
15 to be on the legislative agenda this session is going to
16 be eliminating straight ticket voting, because I think
17 when you do have these big sweeps in cities, it adds to
18 the -- it just adds to the perception that judges are
19 politicians and not judges are neutral arbiters of
20 disputes. So, you know, I think as judges campaign on
21 social media, I think -- I think this bias may increase.
22 So for those judges that do -- and I know when I look
23 around this room at all the judges in this room I feel
24 like I'm preaching to the choir, but I think as more
25 judges are on social media, I think what -- what articles

1 you like, what -- what pictures you take at certain
2 events, that all adds to this perception of bias, and I
3 think -- and I hope the judiciary would do some
4 soul-searching on that. Perhaps there might need to be
5 some amendments to the Code of Judicial Conduct to think
6 about it, but anyway, that is my deep thought for the day
7 on perceived bias in the judiciary and hopefully judicial
8 selection reform.

9 CHAIRMAN BABCOCK: Good deep thought.
10 Thanks. Justice Gray.

11 HONORABLE TOM GRAY: Hmm, I probably won't
12 be considered Pollyanna.

13 CHAIRMAN BABCOCK: I know, Polly is right
14 between a couple of grouches.

15 HONORABLE TOM GRAY: When I first was
16 elected I actually started a file on problems that I
17 perceived needed attention, and I grouped them by the
18 branch of government to which the correction should be
19 addressed, legislative, judicial, or executive. I did not
20 crack out that file for today's presentation. I left it
21 back in Waco, and y'all will probably all be grateful for
22 that, so what I did instead is I took the five ideas that
23 I just jotted down and ranked them from tiny to
24 gargantuan. And, Dee Dee, I don't know how to spell that,
25 so I'm going to leave that to you. And so lacking the

1 fortitude that Richard Orsinger has, I won't try to make
2 these five fit together into some coherent linking
3 mechanism, and I'm just going to do my medium level of I
4 guess you would say attention or difficulty. I'm not sure
5 exactly how you would rank them.

6 But we operate in a constitutional republic,
7 and I think the work that Martha has laid out and talked
8 about and Justice Hecht talked about, the enormous amount
9 of time and resources that were dedicated to that project
10 is incredible work, needs to be done, but it's not
11 judicial branch. It is this guy here, and I refer to
12 Eduardo generically as the State Bar. It is the bar
13 president, and he even brought the point up when we were
14 talking about with the family law forms, that we ran into
15 the problem of stepping on the bar's toes of something
16 that was properly charged to their responsibility; and so
17 my idea, concept -- and, of course, it also falls back to
18 the Legislature. Much of what the -- let's see, I had not
19 met Katherine Kase before today, but she's here because
20 what she wants did not get effectuated in the large pink
21 granite building, and so she's now appealing to another
22 branch of government, and while I admire the resolve, I
23 think the answer is you were in the right place. It's a
24 legislative decision of what to do with that.

25 So my kind of whatever level thought you

1 want to attribute to it is that we would refocus the
2 mission statement of the judiciary to case dispositions
3 and justice in those cases and leave the other areas to
4 the appropriate levels of government. To go into that,
5 for example, OCA would provide what it was originally
6 designed to do, which is information technology services
7 for the judiciary; and yet now they regulate three or four
8 professions in their entirety, from the application
9 process, testing, compliance, rule-making, and violation
10 of rules; and it's all within one branch of government.
11 And so I would hope that we can circumscribe and shrink
12 the judicial branch and leave these other areas -- help
13 them where they need help, compile the information that
14 they want. I mean, we were at a chiefs meeting just this
15 week, Monday, and one of the things the Legislature wants
16 to know about the dockets of the intermediate appellate
17 courts is how many more cases are we seeing that are
18 complex because a person is choosing to represent
19 themselves in the appellate process, and also the number
20 of expedited cases that we get from the Legislature. And
21 so but I have to add, we added one of those expedited
22 processes to ourselves with the termination cases and the
23 180-day deadline. So, you know, that's what I would like
24 to see in my medium level of deep thought.

25 CHAIRMAN BABCOCK: Okay. Great. Thank you.

1 Eduardo.

2 MR. RODRIGUEZ: Yeah, we've had a lot of
3 discussion throughout the years here about the -- the
4 middle class public not taking advantage of or being
5 unable to take advantage of legal services and how it's
6 expanding, so my thought is that we ought to devise a next
7 group of Legal Aid. I mean, right now Legal Aid is --
8 services only the poorest of the poor. I think we can
9 devise a system, try and start off by getting some private
10 funding through foundations and so forth, but this level
11 of Legal Aid lawyers would charge, but they wouldn't
12 charge the regular rate that attorneys would charge. They
13 would charge what the clients could pay, and so that you
14 would have -- so that they would be paying for the
15 services.

16 They would get an attorney, just like a
17 Legal Aid attorney, that would be their attorney. His pay
18 would be -- would be paid through the foundation, but yet
19 people are -- were charging people what they can pay so
20 that they can get their attorney, and I think that we can
21 do that. We just need to put our minds to it, and, you
22 know, there's a lot of rich lawyers like Buddy and others
23 around here that we could hit to maybe start a foundation
24 and, you know, do it on a statewide basis to set up a
25 corpus of funds that we could start off maybe a program

1 somewhere in one of the cities, major cities, but it would
2 not be free legal services. It would be legal service --
3 you would get legal services, but at a cost that you could
4 afford, and I think that -- I think the public would be
5 well-served if we came up with that kind of a project.

6 CHAIRMAN BABCOCK: Uh-huh. I can sort of
7 almost see it chiseled in granite, the Buddy Low Justice
8 Center.

9 MR. LOW: Boy, you would have some people
10 that just turned their head when they saw that.

11 CHAIRMAN BABCOCK: Well, we don't care, if
12 you're going to fund it for us.

13 MR. ORSINGER: There would be a lot of
14 graffiti on it.

15 CHAIRMAN BABCOCK: Levi.

16 HONORABLE LEVI BENTON: Before I give you my
17 deep thoughts I need immunity, and I need the record
18 sealed.

19 CHAIRMAN BABCOCK: Well, I think we can
20 confer, and I think that request will be denied.

21 HONORABLE LEVI BENTON: I figured. We
22 talked a lot about the economic consequences of discovery
23 this morning. It isn't the discovery that causes the
24 biggest economic problems in our system, in my view. It's
25 delay in getting a ruling, getting an opinion, and so to

1 fix that problem what we need in my view is to
2 substantially increase transparency in the judiciary. Let
3 me be more specific about what I mean. Let's suppose the
4 Billy Bob Smith vs. Ann case has been argued to the
5 Supreme Court and the assignment for writing that opinion
6 is given to Justice Boyd. The public ought to know that
7 that case, the opinion is pending in Justice Boyd's
8 chamber; and if it takes a year to get that opinion out,
9 the public ought to know that it's something going -- it
10 may be that there's something going on in Justice Boyd's
11 chamber.

12 We have more transparency in the Legislature
13 and in the executive branch. We know what committees get
14 bills. We know when the committees -- we don't have
15 perfect transparency, but we know when the committees hear
16 testimony, when they debate those bills. We have some
17 amount of transparency in the executive, in the Governor's
18 office. At the lower court levels, same thing. If
19 Justice Gray is holding up an opinion or if it's taking a
20 while to get the opinion out, we ought to know that
21 opinion is assigned to Justice Gray; and on the trial
22 court level -- if I ever go back, I don't want this rule,
23 but if -- we ought to know whether Judge Benton is in
24 trial on a particular day or not. We ought to know what
25 motions are pending in Judge Benton's chamber and how long

1 they've been there, and that information ought to be on
2 the website and ought to be easily accessible.

3 HONORABLE DAVID EVANS: You were doing fine
4 as long as you were talking about Justice Boyd.

5 HONORABLE LEVI BENTON: I know. You know,
6 listen, listen, I know. It's painful because I've been
7 there.

8 HONORABLE DAVID EVANS: I'm sorry.

9 HONORABLE LEVI BENTON: That's -- I've been
10 there, and these are things -- that's why I want the
11 record sealed and I want immunity.

12 HONORABLE TOM GRAY: David, he's starting to
13 meddle now.

14 HONORABLE DAVID EVANS: Yeah. There's no
15 time limits.

16 MR. ORSINGER: This is too deep. Too deep.
17 Be a little shallow.

18 CHAIRMAN BABCOCK: No, he's digging deep,
19 this one.

20 HONORABLE LEVI BENTON: And I -- one of my
21 predecessor speakers gave me something that gave me this
22 idea. You know, we have all sorts of things that the
23 reviewing courts are required to review on an expedited
24 basis. Okay. So maybe we can do some things to fix that.
25 On certain -- on level three cases perhaps, or maybe you

1 could have some other definition, when a trial court judge
2 denies a motion for summary judgment, instead of burdening
3 the intermediate court, maybe we send that motion to a
4 district judge in another county of equal size, but we do
5 it blind. Judge Evans wouldn't know that the motion is
6 coming out of Judge Benton's court. He wouldn't know that
7 Eddie and Scott are the advocates; and he just says, you
8 know, "On this motion here's what I would do"; and if that
9 result is different than what the presiding judge did,
10 then maybe that party who had their motion denied gets a
11 right to an interlocutory appeal.

12 So, you know, transparency, more review of
13 critical -- I'll just say critical motions, and I don't
14 know how you define that. Critical motions which are
15 denied and the party who moved and has their motion denied
16 has no opportunity for anyone else to look at it. That's
17 it.

18 CHAIRMAN BABCOCK: Okay. Justice Gray.

19 HONORABLE TOM GRAY: Of course, we do have
20 the agreed interlocutory appeals now that we've seen quite
21 a few of and efficient use of, I think, that resolve a
22 case dispositive legal issue; but where I thought you were
23 going with part of your comments -- and it would certainly
24 be needed to implement them -- is what I referred to last
25 time as a bigger pipeline of more judges, because whether

1 you're dealing with a pro se or trying to get something
2 done on discovery or whatever, we need more judges at the
3 trial level and the intermediate appellate courts.

4 HONORABLE LEVI BENTON: But we can't make
5 the case legitimately in my opinion unless we give the
6 public more transparency on whether I'm playing golf today
7 or I'm in the office or someplace working on a pending
8 motion. Now, the reviewing judges can work from anywhere
9 in the world, and in some cases the trial court judges can
10 work from anywhere in the world, but I know we have to
11 balance the judge's safety with some record of am I coming
12 in at 11:00 and leaving at 3:00. How many cases -- or how
13 many cases over a certain amount of time are waiting for a
14 trial? So I am going to be hated by a lot of people.
15 Anyway.

16 CHAIRMAN BABCOCK: Got it. Thank you.
17 Scott.

18 MR. STOLLEY: I like you, Levi, because
19 you're suggesting more appeals, and as an appellate lawyer
20 I love more appeals. Now, my comment is going to be this.
21 I worked in big law firms for many years. I went to a
22 smaller law firm. Now I'm a solo, and in that transition
23 I have seen my practice mix change significantly, and it's
24 really interesting how your perspective changes when you
25 have a different practice mix. So my point I want to make

1 is this. We hear a lot of complaints from the business
2 community that the litigation system is too costly,
3 costing them too much money, but I can tell you now from
4 being on the other side in a number of cases, that I am
5 frequently seeing the economically powerful, either
6 individuals or businesses, use -- misuse the litigation
7 system to virtually crush the other side into dust.

8 So I want to urge this committee and the
9 judiciary as you focus on rule changes to make the system
10 better, remember to maintain a balance, because the
11 judicial system is not just being used against business.
12 It's being used by business, and I won't go into all of
13 the stories of what I've seen, but it's pretty horrifying
14 sometimes.

15 I will make one comment about the vanishing
16 jury trial. I love David Beck's statement that we have to
17 convince judges that a trial is not a failure of the
18 system, and I would love to see that attitude start
19 infiltrating into the judiciary because I think it's true.

20 And then the last comment I will make that
21 is in terms of improving civility among lawyers in the
22 cases, many of you are probably aware of Steve Susman's
23 sort of form agreement between counsel to work together on
24 things that can be agreed, and maybe we could take a look
25 at that form and see if any of those kinds of things can

1 be adopted.

2 CHAIRMAN BABCOCK: Great. Thank you.

3 Hayes.

4 MR. FULLER: These may be more scattered
5 thoughts than deep thoughts, but first of all, I want to
6 focus on the access of justice that we've been talking
7 about, because I think that particular issue -- I mean, we
8 hear it in the background. We've heard it for years in
9 the background, and I'm not sure many of us in the busy
10 press of day-to-day practice have really thought about
11 what that's -- yeah, it's something good, we ought to get
12 to that later sort of thing, but I really think that issue
13 more -- I have thought about it, is becoming an
14 existential issue not only for the bar but for our
15 republic, because we are a republic based upon the rule of
16 law; and we've got to think about what the rule of law is,
17 what is the justice baseline that we're trying to provide
18 access to.

19 On its simplest level I think it means that
20 we expect a fair deal, you know, that we expect a fair
21 shake to present our dispute and get treated fairly in
22 response and then kind of understand why it might not have
23 gone our way or why it did go our way; and my concern is
24 that we are at a tipping point for a large segment of our
25 population. Perhaps the population that Roger is worried

1 about in this -- in this discourse that's becoming so, so
2 violent, because the fact of the matter is if we are at
3 this tipping point to where people feel or a majority of
4 the people feel that they can't get a fair deal or a fair
5 shake or the system isn't fair, that undermines the
6 respect, the ultimate respect we have for the rule of law;
7 and if we ever lose that, we undermine our republic; and
8 we certainly undermine the profession. So I think this
9 truly is a big issue.

10 Having said that, I think the ABA and the
11 Commission to Expand Legal Service reports are a very good
12 starting point. They recognize that importance, and from
13 a strategic overview of kind of where we are and what we
14 might do to address those issues I think they're very good
15 starting points. I'm particularly impressed with the
16 Commission on Legal Services where -- or to Expand Legal
17 Services in terms of data collection. I think we have to
18 know where the problems are, because in some instances
19 they're endemic. They're there, and they will always be
20 there. In others they're transitory, much as Roger I
21 think suggested. Is it going to be foreclosures this
22 year, or is it going to be debt collection next year, or
23 is it going to be hail damage, you know, that year or
24 whatever? That's a kind of transitory problem, and we
25 have to be flexible enough to address each, but we've got

1 to have the data to identify where these problems are so
2 we can focus on particular problems and prioritize our
3 response to these problems.

4 Along those same lines I also like the
5 suggestions of navigators and pipelines, because I think
6 that allows us to, number one, get folks in need of
7 service to the services currently being provided, and once
8 we've done that we will then know -- hopefully we will
9 know how much more or what else we need to do and where to
10 focus what our limited resources in that regard. Where I
11 think the report stops short is, you know, as you read
12 them, they're very ad hoc. They're kind of the best we
13 can come up with, but they are not so -- they're not
14 tactically focused or oriented in terms of, okay, here's a
15 problem, here's the mission, who's going to be responsible
16 for carrying out, how are we -- what deliverable are we
17 expecting, and how do we measure our success, have we
18 solved the problem or not.

19 So I think that is probably the next level,
20 and that's where it gets sticky, because somebody has got
21 to be persuaded, either voluntarily or involuntarily, to
22 accept that responsibility and move forward with a
23 solution. And I'm not -- you know, I'm short on solutions
24 there, but I think that, you know, we've kind of had
25 variances of that, contingent fees, causes of action. You

1 know, that's the whole basis for our justice system. If
2 someone is doing something wrong, we have a cause of
3 action to address that, and we have the ability for
4 somebody to get compensated for addressing that wrong. So
5 we've got to be very careful along the lines of what Scott
6 was suggesting of how we balance the system to make sure
7 that people can get a fair deal or justice, whatever that
8 may be.

9 And so I think that's kind of where our
10 focus is, and kind of as a last comment I think we have to
11 be realistic about -- and I'm bordering on heresy here.
12 I'm sure I'll pay for it. The whole concept of
13 nontraditional providers of legal services and the
14 unauthorized practice of law, that has been a hot button
15 issue for many lawyers and will continue to be a hot
16 button issue, but I think we all -- something we all need
17 to realize is this. If there is a significant portion of
18 the population that is not being served by the bar and
19 nontraditional legal providers are prepared to come in and
20 provide the services that those folks are willing to
21 accept, then I'm not sure the bar has much room to gripe
22 about it. In essence we have almost forfeited our right
23 to serve that public, that portion of the public, and you
24 know, at that point I think maybe the judiciary needs to
25 be focused on if the nontraditional providers are going to

1 come in because nobody else will do it then we need to
2 focus our efforts on how to make sure the public is not
3 harmed by that and what the standard of care for those
4 nontraditional providers is going to be and what standard
5 they're going to be held accountable against. So that's
6 my scattered thoughts.

7 CHAIRMAN BABCOCK: Thank you. Not so
8 scattered. Wade.

9 MR. SHELTON: You know, I think that we have
10 good judges in Texas, we have good lawyers in Texas, and I
11 think our system is largely good, but then we have to deal
12 with the old saying that perception is reality. Going
13 back to some of Lisa's comments, when we were talking
14 about the point of our selection situation. You know, if
15 you turn on the TV at any given time and they're talking
16 about anything in the Federal system, you're never hearing
17 a judge's name unless you're hearing that he is a Bush
18 appointee or she is a Clinton appointee or something of
19 that nature. So our -- just by common media, common
20 communication, mass communication, our judges are
21 connected with a partisan group almost all the time, and
22 then with us electing on a particular ballot, especially
23 with our judges being down ballot, they're identified with
24 a particular party and what that particular party stands
25 for.

1 And if you don't hear it a lot, then just
2 act as a mediator, because in almost every mediation
3 you're hearing commentary about the bias of the particular
4 judge or a particular level -- appellate level, and so --
5 and it comes from the business side. It comes from the
6 individuals. It comes from the lawyers where they're
7 saying, "Well, I know that judge is this way,"
8 articulating a bias, "but I'm not worried because I know
9 that the Fourth Court" or "the Supreme Court," or name
10 your court, "will never go this way because they are pro"
11 -- fill in the blank. Now, that isn't true necessarily,
12 but it is absolutely commonly discussed out there, and
13 that can't go on.

14 The other thing is that lawyers, I think,
15 again, being blessed by doing a lot of mediations, so many
16 of our lawyers are so much better than they're given
17 credit for, but perception being what it is, mass
18 communication doing what it does, creates a problem for
19 us, and so we have to be very, very conscience about
20 overcoming that because I'm not like Lisa. I'm not
21 Pollyanna-ish. I don't think we'll ever get around to
22 changing our selection system, to be perfectly honest
23 about it.

24 Now, going to this access to justice thing,
25 one of the problems is I think among a lot of lawyers is

1 that we get very busy. We have pressures of business. In
2 fact, business has overcome the profession; and we're
3 really struggling to pay bills, pay overhead, and get
4 things done; and we keep hearing about access to justice,
5 but never seeing anything in particular being done. In
6 Bexar County we've been blessed with the community justice
7 program, which I think is a really good unit and does a
8 nice job, but apparently doesn't really put much of a dent
9 in the overall problem as we keep hearing about it. So
10 that makes a lot of people think that it's one of those
11 problems like public school funding, public school
12 generally, that every four years we hear in the newspaper
13 editorials about changing our selection process. It
14 sounds like a problem for which there is no passion to
15 address. Okay. And so that causes it to go in one ear
16 and out the other; and so going back, golly, to anywhere
17 along this row of comments, it really does I think call
18 for kind of a consolidated every effort with -- it was
19 you, Hayes -- with a tactical mission. And so, for
20 example, it seems like we have everything in place, right?
21 We have an ability to prescreen the indigents. All right.
22 The folks who prescreen them don't have the capacity to
23 serve them, so, therefore, we have this existing pool of
24 clients, number one.

25 Number two, we've got a bunch of law

1 students that we heard the dean talk about need to be
2 educated in a newer way, a hands on way, and things of
3 that nature, and we have a growth of clinics. We have
4 technology so that the clinic students in Texas Tech can
5 serve the population out in far West Texas where they
6 cannot get to; but they can do it by means of digital and,
7 you know, whatever the visual digital equivalent is called
8 these days; but there can be face-to-face communication
9 with their far-flung clients while they are in their law
10 school, for example. And a brand new lawyer who has come
11 out and has not yet become fully employed would be able to
12 do the very same thing in conjunction with the clinical
13 law student and, therefore, have support while that lawyer
14 is struggling to make ends meet and can only dedicate a
15 small amount of time. Those students can support him as
16 though they were paid law clerks or, you know, interns.

17 And then we have space, don't we? I mean,
18 most of the larger communities have room in their
19 courthouse. If not room in their courthouse, room in some
20 communities in their bar association building. If not
21 there, room in some of the larger firms. Sadly almost
22 every firm I know has some empty offices available to it,
23 you know, because of the economic struggles that they go
24 through. So there is space available to do this.

25 What I would like to -- you know what else?

1 Judges, the dockets may be overloaded with this pouring on
2 of family law and pro ses and all these other things that
3 tend to clog them up, but if the straight ticket has done
4 anything it's made available sitting judges and retired
5 judges available to us; and if they want to go ahead and
6 find their appointment through the administrative judge,
7 perhaps they should be able to say, well, if you do that,
8 you need to volunteer X amount of time serving as a
9 designated judge on the pro se pro bono docket so we can
10 funnel these things through more efficiently. We have
11 that available already to us.

12 What I would -- well, I'm sorry. I'm on a
13 roll now, but we have the forms, let's make use of them.
14 There's no reason why a pro bono lawyer should necessarily
15 look past Supreme Court approved forms, and you know what,
16 these folks need it for free, and these lawyers need to
17 make a living and get on about making a living, then just
18 fill in those blanks and use them and be proud about using
19 them, and so that's already there.

20 What I would ask that be considered is that
21 we give a greater emphasis to the pro bono mediation
22 communities. I don't really know how far flung it is, but
23 in Bexar County we have the Bexar County Dispute
24 Resolution Center in which mediators go to volunteer in
25 donated spaces, and so we just show up. It's given to us.

1 We mediate. Probably 99 percent of that is this pro se
2 and/or indigent or very low valued, if you will, small,
3 small, even negative estate divorce cases; but it allows
4 people to come in and volunteer and think about it for a
5 moment. I was talking to Hayes. I thought how ironic it
6 was that our law schools are educating and certifying
7 these law students to come out as mediators and then they
8 come in and they're interviewing and say, "I'm a certified
9 mediator," and I'm sitting across the desk saying, "That's
10 the one job left for old people. You know, they're not
11 going to be hiring young kids with wet ears to be
12 mediators." Well, guess what they can do. I mean,
13 they're actually trained. They actually went through the
14 very same training as anyone else in this room, and they
15 could be available to pour into these dispute resolution
16 centers to help resolve it.

17 And then we get finally to the trial piece
18 of it, and that's when we can really say a trial is not a
19 failure of the system because if a case has been properly
20 developed with attentive professionals and has gone
21 through an honest mediation, by the time it's in trial
22 that's our highest calling, and the judges will be more
23 happy, and the litigants will be feeling like they've been
24 treated fair, and the rule of law will be upheld. It's a
25 matter of time and money, but it's all there. It's a

1 matter of just comprehensively bringing it in and doing
2 it. It's connecting the dots. We got to the moon when we
3 wanted to get to the moon. We're not fixing school
4 finance because we don't want to fix school finance, but
5 this is more like the moon shot. I think it could be
6 done.

7 CHAIRMAN BABCOCK: Pam. Thank you, Wade.

8 MS. BARON: Two quick ideas. One sort of
9 feeds off of what he just said, which is, you know, Teach
10 For America and similar programs have done a fantastic job
11 of taking new graduates and placing them in underserved
12 communities and to make it prestigious for those new
13 graduates, and if we could do something like that with all
14 of these new lawyers who are coming out of law school,
15 many of whom don't have significant job prospects, give it
16 a fancy title, let them come, have meetings at the Supreme
17 Court or at various courts all over the state, but they
18 would be doing pro se work. Now, the problem with Teach
19 For America, of course, it's funded because the
20 teachers -- they're filling a teacher's job, and they're
21 getting paid a teacher's salary. So you would need law
22 firms I guess to agree to create sort of a staff attorney
23 scholar, legal scholar, program of these people who would
24 participate, and they would provide functions similar to
25 the pro se lawyer in Bexar County where maybe they have a

1 regular day once a week at the courthouse or at a
2 particular place where they would assist people on a
3 walk-in basis or something like that.

4 My other thought is please don't assume that
5 the State Bar sections are roadblocks. We are resources.
6 The appellate section of the State Bar has done a lot of
7 work with the Texas Supreme Court and with the 14 courts
8 of appeals in establishing a referral program for people
9 who need pro bono assistance, and parties can come in and
10 apply, or the courts can actually refer different parties
11 out to our program, and they are placed with counsel for
12 the appeal, and it's a great group of people. If there
13 are other ideas of how that can be expanded, I know the
14 section would be quite willing to take it on.

15 CHAIRMAN BABCOCK: Great. Thanks, Pam.
16 Bobby.

17 MR. MEADOWS: Well, we haven't
18 gotten halfway across the room, and these are a lot of
19 great comments, good ideas. The thing that's on my mind
20 -- and maybe just because it's before the committee now --
21 is our focus on discovery and its cost. And we should be
22 focusing on it because it is time-consuming and it is
23 costly, but in my view it is a superficial treatment of a
24 bigger underlying problem, and that is that dispute
25 resolution is not occurring often enough in our courts.

1 And so what I'd like to see us do is to really step back,
2 all the way back, and examine every aspect of a lawsuit to
3 determine how we can make it easier for litigants to use
4 the courts to resolve problems.

5 You know, we've heard ideas along the way
6 about simplifying pleadings, of course, discovery
7 limitations and that sort of thing, but just a complete
8 brand new look at how we -- I mean, our business about
9 tiering things and breaking it up so that certain cases
10 fit certain places where there's a certain amount of
11 discovery. That's an idea. That's something that I think
12 is working. I think it's going to get further treatment
13 as we go forward with our examination of the discovery
14 rules, but I think we should step all the way back and
15 just see what we can do to revitalize the use of the
16 courts.

17 And in that my only other comment would be
18 that in that process I think we should examine how we can
19 make litigation, use of the courts, more tolerable for
20 juries. The -- our entire -- I think juries are the
21 forgotten piece of our focus on revitalizing the jury
22 trial, and so something needs to be done to make that a
23 better experience. Almost every juror I talk to at the
24 end of the case felt good about the service, but they were
25 generally annoyed with how the process went, how much time

1 they spent waiting outside, how much time was -- things
2 were going on and they didn't know what it was about, no
3 explanation, they were just essentially discarded while
4 something else went on. So I think we should take better
5 care of the juries if we're going to examine how we can
6 better use the courts for jury trials.

7 CHAIRMAN BABCOCK: Great. Thanks, Bobby.
8 Judge Evans.

9 HONORABLE DAVID EVANS: These ideas looked a
10 lot better last night when R. H. and I had our pick one
11 idea session fueled by substances; but almost every
12 meeting boils down to reoccurring problems, either
13 reoccurring problems with opposing counsel, this
14 caricature of an opposing counsel, or of trial courts and
15 how they handle matters; and I wonder if it's not time to
16 decide whether we need a bench-bar committee. This is a
17 bench-bar committee, members of the bench and the bar,
18 that attacks identifying the reoccurring problems and
19 identifying the best management or docket management
20 practices that exist and making recommendations. OCA
21 being involved.

22 And to set some of the reoccurring problems
23 I'm going to set out but not offer solutions for, I want
24 you to keep in mind that in my region, like David's
25 region, if I go from Wichita Falls, I have three district

1 courts. It has three district courts and two county
2 courts at law with the same jurisdiction, and they're all
3 general jurisdiction courts. They all try criminal cases,
4 civil, and family cases. Step down a county level, I run
5 into Archer, Montague, and Clay County, one judge, three
6 counties. Wise County, Judge Fostel, a semi-urban
7 suburban area, growing, with a rural county; Jack, next to
8 it, two-county district. Tarrant County is probably the
9 ultimate in specialization with three -- one criminal
10 courthouse of 10 floors, a family law courthouse of six
11 floors, and a civil courthouse of six floors.

12 Now, think about reoccurring problems like
13 this. Legislative priorities. I rarely worry about
14 criminal priority over in the civil court, but think about
15 the judge up in Wichita County that's running a general
16 jurisdiction court, got to clear his criminal docket
17 before he can reach his civil docket. Now, there's a
18 resource that has to be allocated every week, and it's
19 attorneys. So how do you allocate attorneys when you have
20 attorneys that have conflicting settings? There's another
21 management problem. How do you handle this problem of
22 conferences in civil courts? What's the best practice?
23 Is there a consensus in the group? What do you -- if you
24 make a determination, not a rule, but a best practice, you
25 made a determination there was an inadequate effort to

1 confer. What is it you want the trial judge to do? Do
2 you want him just to grade the request for production and
3 the objections and say, "Here it is, go back and try
4 again"?

5 What about trial settings? Do you like
6 trial judges and sit like my court? Some judges in my
7 courthouse call all 14 cases on the docket. That's 14
8 weekends, 14 repetitive cost of preparation, for 14 cases
9 where probably 10 won't get reached. Is that a cost? Is
10 that docket management good docket management? What
11 disposes of civil cases, hearings on dispositive motions
12 or key motions or just running a constant trial docket?
13 The problem is, is that the trial judges, when they go to
14 judicial conference, they spend a large part of that
15 conference going to the other judges, finding judges who
16 have similar dockets, saying, "How do you handle this
17 problem?" But that feedback doesn't get practitioner
18 feedback, and so it's one-sided.

19 Now, I have yet to see a bar group --
20 there's a lot of talk, when I was a lawyer, "Well, we
21 ought to go down and see judge so-and-so and tell him or
22 her what to do" and then we would designate somebody to
23 go. They would drink a lot. They would think about it
24 and then they would go, and there's a story in Fort Worth
25 about a judge who they sent somebody over to see and talk

1 about, but he wasn't elected. But so on that edge, we
2 don't offer anything to the practitioners -- I mean, to
3 the judges as to what's the best practice on any of the
4 recurring problems. It's not on any source that you can
5 go find. You go to the national center, you go look, you
6 don't find any of that. So I would just offer that.

7 There's a whole series of reoccurring
8 problems that I thought of. You know, do you dispose
9 of -- do you set up this failure to rule? You know,
10 there's a guideline in the administrative rules. You've
11 got to rule within 90 days. I think it may be
12 incorporated in the civil practice rules. It's a
13 guideline that you should rule on a motion within 90 days
14 of submission, but there's not a default or a mandate like
15 there is in 91a that you must grant or deny within 45
16 days, so is it appropriate now to say that on all motions
17 you must -- you have to do it by a certain time at a trial
18 court level? Does that help move a slow docket?

19 I think those are the things -- I would say
20 the second most costly thing on litigation, civil
21 litigation, of which I speak mostly, is docket management
22 techniques, which ones are productive, which ones are
23 effective, and how do you handle the reoccurring problems.
24 The judges want to do a good job, and they want to know --
25 but they don't get -- they don't get direct feedback on

1 what's the best practice from a group like this unless
2 they were to read these transcripts. So that was my
3 offer.

4 I promised myself that I wasn't going to
5 talk about split ticket voting. I have no opinion about
6 whether they ought to split the -- split ticket voting. I
7 mean, I'm not in that war, but I just want to tell you
8 that I'm proud to tell you that I outpolled Mr. Trump by
9 70,000 votes, and I outpolled Mr. Romney by 23,000 votes
10 in a straight ticket voting. So you draw your conclusions
11 as to whether we've been straight ticket voting or not and
12 go read all of those things, and that, by the way, only 65
13 percent of the voters voted for me, and 98 percent of the
14 voters voted in the presidential election. So there was
15 an under vote, and I still beat Trump. So I don't think
16 it's a cure-all. Split ticket voting, splitting the
17 ticket, splitting a straight ticket, won't get to
18 nonpartisan elections. Anyway, that's it.

19 CHAIRMAN BABCOCK: Well, I'm afraid you're
20 going to suffer an adverse tweet any minute here now, with
21 a revelation of that --

22 HONORABLE DAVID EVANS: I get a tweet right
23 now. Well, I'm going to want to strike that out of the
24 record when I get home.

25 CHAIRMAN BABCOCK: Too late. Peter.

1 HONORABLE DAVID EVANS: That's it.

2 MR. KELLY: Two thoughts. First relating to
3 the cost of discovery, so often it's posited as a result
4 of the cost of compliance. The requesting party has
5 requested too much, it's overbroad, only one page out of a
6 thousand ever gets used; but I think that in the
7 discussions we've had here it's frequently overlooked.
8 That is driven by the objections that have been posited in
9 the past. In a way it's the business community that has
10 brought it on itself by forcing requesting parties to be
11 overbroad to request of them. Going back to the Ford
12 Pinto case back in 1978, the -- you know, Ford said, "We
13 don't have any documents. We don't have any cost benefit
14 analysis." Well, it turns out they had a trend cost
15 estimate. So that means the next time there was a lawsuit
16 the requesting party had to say, "Any and all documents
17 talking about costs," you know, "in relation to risks in
18 relation to benefits," and which opened up the scope of
19 discovery even more. So it's sort of an arms race going
20 back and forth; and if we're going to limit what the
21 parties can request, requesting party can request, then
22 you should also limit drastically the types of objections
23 that can be made, in some way cut short that arms race so
24 that the relevant documents are produced and there is less
25 resistance.

1 Touching on what you said earlier, Chip,
2 about, you know, the California lawyer who would respond.
3 It's very frustrating doing discovery, that, you know, 30
4 days to get a response. You get it, it's inadequate.
5 Well, you don't file a motion on day 31. You call up the
6 other side, "Hey, can you comply?" So it's about day 40
7 you file a motion, a motion to compel. Well, that doesn't
8 get set until day 60, so then they get another 30 days to
9 comply. Now you're at day 90, so it's 180 days where it
10 should be a 30-day process. Perhaps encourage the trial
11 judges to use the remedies at their disposal, sanctions,
12 whatever, to force discovery to occur more quickly, and
13 that will cut down on a lot of the costs, a lot of the
14 trips down to the courthouse.

15 And on the subject of teeth and penalties,
16 one of the problems with this particular group is that the
17 vast bulk of cases, the vast bulk of discovery that goes
18 on, is going to be in minimum policy limit car wrecks, and
19 I don't think anybody here has handled a minimum policy
20 car wreck case in the past couple decades. I would
21 suggest that if we are going to adopt new discovery rules
22 that we expand beyond this particular group and similar to
23 what we did with the expedited trials a couple of years
24 ago is set up a task force involving the insurance defense
25 lawyers and the plaintiff lawyers that do that, have them

1 address streamlined discovery rules with teeth in them so
2 that similar to the request for disclosure. So often you
3 see parties just not complying with request for
4 disclosure, and you're not designating the witnesses
5 properly, the experts properly, and the trial judge will
6 let them up.

7 Put in something with actual teeth in it so
8 there are penalties for not complying, make mandatory
9 disclosures with harsher penalties for the parties that
10 don't comply. Gear that towards those 30,000-dollar
11 cases, even peg it to the minimum limits, because the vast
12 majority of cases are going to be 30,000-dollar cases.
13 That's what most car wrecks are. Even if it's \$50,000 in
14 damages, it would only be \$30,000 at issue because that's
15 what the insurance is. And try to discover discovery
16 rules. That's going to be -- the primary place where the
17 public interfaces with the judicial system is going to be
18 either divorces or with the small car wreck cases.
19 Develop streamlined discovery rules with actual penalties,
20 and that can solve a lot of the problem going forward of
21 friction within the courthouse, and let the judges handle
22 these larger cases where you have thousands of pages of
23 production.

24 The second one is not a deep thought, but
25 more of a pet peeve and has to do with summary judgment

1 issues, and the appellate judges can probably address it
2 even better. I get very frustrated when I'm handling an
3 appeal of a summary judgment, and I can't tell what
4 grounds are stated. It says it's a traditional motion,
5 but then they put in a footnote "and besides, there's no
6 evidence of causation." Well, do I have to address that
7 or not? And I've had cases where the first half of the
8 opinion is just trying to figure out what issues have been
9 raised in the motion for summary judgment. I think it
10 would -- a corollary problem is when you have something
11 where it's really a duty motion for summary judgment.
12 That's what the case is about. Well, they also throw in
13 no evidence of causation, no evidence of damages. Well, I
14 have to respond to that. Then when I take it up on appeal
15 I have to brief that. The court of appeals has to go
16 through every single one of those issues, even though the
17 core issue is really just duty. I think it would be
18 beneficial if the trial judges -- and they probably don't
19 want to assume this particular work -- would state the
20 grounds that they are granting the summary judgment.

21 If what we're talking about at the actual
22 oral hearing on summary judgment in the trial court is
23 duty and that's the basis for the summary judgment, you
24 shouldn't make the appellate lawyers go through every
25 single issue that's even halfway mentioned in the motion,

1 and you shouldn't make the appellate judges have to go
2 through every single issue.

3 CHAIRMAN BABCOCK: Okay. Thank you, Peter.
4 Kent.

5 HONORABLE KENT SULLIVAN: I had some
6 thoughts that were actually similar to those expressed by
7 Bobby Meadows about the use of jurors, and I think it
8 would be worthwhile for us to consider a review of some of
9 the major assumptions we make about the pretrial
10 management of potential jurors and the management and use
11 of jurors during trial. From a pretrial point of view,
12 just a couple of examples. I think that our
13 administrative process of summoning, processing, and even
14 excusing potential jurors should be made as uniform as
15 possible, and we need to try to get away from some of the
16 idiosyncratic county-specific practices that are in use
17 that sometimes can create some meaningful differences in
18 the entire panels that you might get from one county to
19 another.

20 I think we need to use technology
21 effectively to make jury service less burdensome, to allow
22 potential jurors to supply their information remotely, to
23 allow jurors to avoid being called for actual service and
24 potentially an unnecessary trip to the courthouse unless
25 they are actually needed for a trial that is going to go

1 forward. We need to end something I think Bobby alluded
2 to, and that is having jurors spend unnecessary hours or
3 even days at the courthouse to do nothing. It leads to a
4 lot of cynicism and a lot of inefficiency, and I'll raise
5 one quick example, and that is I think Travis County has
6 done pretty well at getting it right, where you can
7 basically register your information remotely. You can not
8 go to the courthouse, and even though you've been summoned
9 you can never appear at the courthouse unless you've
10 gotten called that day saying that there is actually a
11 trial that you are needed for and you are to report to the
12 specific courtroom and Judge XYZ. It seems to work pretty
13 well. I have been summoned several times and only
14 actually had to appear at the courthouse once, because as
15 often is the case, the case was resolved and we weren't
16 actually needed.

17 As for later in the process, I think we need
18 -- and this is I think our third anniversary. Judge
19 Peeples and I talked about this earlier. We need a
20 statewide rule on voir dire and jury selection generally,
21 some clearer boundaries for the role of the court and the
22 lawyers in the process, clear but reasonable limitations
23 on the proper scope of the inquiry in terms of voir dire
24 and jury selection, and the amount of time that would be
25 devoted to it. Make some reasonable effort to balance

1 issues like the right to get -- to obtain information from
2 jurors and a juror's reasonable expectation of privacy.
3 After a jury is impaneled it strikes me that they should
4 be the beneficiaries of a process that has been reasonably
5 streamlined for them to honor their time and their
6 service. A couple of examples, require when possible the
7 pretrial admission of exhibits that can be admitted by
8 agreement and rulings on questions of evidence and
9 admissibility of evidence when there's no witness or other
10 evidentiary predicate that is required. We need to
11 telegraph to jurors I think in some meaningful way that we
12 really honor their time and their commitment and we won't
13 waste it.

14 I think they're entitled to some broad
15 educational instructions at the beginning of the case, at
16 least that are relevant to the category of case they're
17 going to hear and provide them with some general education
18 as to some of the basic legal principles that will help
19 them issue spot and will give them some reasonable advance
20 notice of what they're going to be asked to do at the
21 conclusion of the case. I think it would help relieve
22 some potential frustration that they often feel because
23 they don't get adequate information, and they have some
24 uncertainty as to what their job description really is.

25 Finally, with respect to instructing the

1 jury, it seems to me we need a project to really take a
2 hard look at the use of plain language in jury
3 instructions. The pattern jury charge, which I think is
4 the ultimate source of most charges in civil cases, is
5 still largely tied to language that you find in the
6 caselaw and in statutes, and that language is often not
7 user friendly, and we have to remember that the ultimate
8 users really are the jurors, not the lawyers, not even the
9 judge. It's got to be language that is capable of common
10 understanding, and I think we've got a system that is to
11 some extent dysfunctional in that we don't have one in
12 which the ultimate work product that we produce is one
13 that we have adequate reason to believe is easy to use and
14 to comprehend by the people who need to use the work
15 product. That's it.

16 CHAIRMAN BABCOCK: Thank you. Thank you,
17 Kent. Justice Bland.

18 HONORABLE JANE BLAND: We have been -- or
19 the Texas Supreme Court has been looking at ways to remove
20 obstructions in this pipeline, increase efficient
21 resolution of disputes, and we have looked at it. We look
22 at it or the court is looking at it. All of us are
23 looking at it in connection with the consumer, the lawyer,
24 how we can improve, you know, the rules in connection with
25 lawyers and lawyer discipline and ethical rules with

1 technology. I think we should also take a look at the
2 tribunals, and in particular, examine jurisdiction,
3 subject matter jurisdiction in Texas, and see if it fits
4 within the strategic plan that we're looking for for the
5 court in years to come.

6 A lot of our court system and the subject
7 matter jurisdiction of any particular court has been sort
8 of driven on an ad hoc basis. As a county explodes in
9 population like Tarrant County, we'll add a district court
10 there to ease the burden. We've got problems with
11 domestic violence specialization, and we'll create a
12 domestic violence court, and we'll get that funded, but we
13 have -- now we've got, you know, an unwieldily number of
14 statutes that confer jurisdiction on these various courts;
15 and if we had a committee that could take a look all of
16 this and think of strategic reforms that might -- that
17 they could recommend to the Texas Supreme Court and/or to
18 the Legislature to make this architecture more efficient,
19 because as Judge Gray said, we don't need -- we need all
20 of the judges we have, but what we need to do is deploy
21 them in a way to increase efficiency and reduce costs.
22 And so we need somebody to at look to see are we deploying
23 our judges in the best way that we can for the problems
24 that we have.

25 And it reminds me a little bit of Congress

1 and the base closing commissions, because whenever you
2 talk about changing or even looking at or even thinking
3 about strategic reforms to the subject matter jurisdiction
4 of any tribunal, you know, there's going to be a lot of
5 stakeholders, and in Texas in particular our funding comes
6 from lots of different sources, but if you had a
7 commission that would kind of take a look at this with a
8 view of future forward planning and make recommendations
9 it would be a start. You could get, you know, all of the
10 stakeholders that would be involved in this. I think
11 there have been remarks made in Texas Supreme Court
12 opinions and in advocacy groups to the Legislature and
13 others about, you know, the need for a look at this; but
14 those might be coming with a view as to a particular kind
15 of lawsuit; and I'm saying let's take as a given the kinds
16 of lawsuits we have and then see where we want to be
17 deploring our judges.

18 In particular, 77 percent of the cases filed
19 in Texas are justice of the peace courts and municipal
20 courts that are largely -- and all of the justice of the
21 peace courts and most of the municipal courts are no
22 record courts. If there is a place for looking at what
23 they do and how they can do it in a way that's, you know,
24 more intuitive for users, that's simpler for users, and
25 can take advantage of digital facilities rather than sort

1 of traditional bricks and mortar, that's a place we should
2 be looking at it. That's a place where we can get big
3 bang for our buck. We would be reaching out and affecting
4 far more Texans than in any other jurisdictional court.

5 Also, only eight percent of the JP judges in
6 Texas are lawyers. Most of the litigants in JP court, not
7 lawyers; but if you look at the JP rules, they don't look
8 that much different at all than the Texas Rules of Civil
9 Procedure. It's -- they're lawyer drafted. They're fine.
10 We all worked on them together. I've worked on them, we
11 all did, but they're not user friendly, and they certainly
12 are not in plain language. The very first rule in the JP
13 rules is the definitional rule that goes (a) to (z), and
14 the only reason I think it doesn't go further than that is
15 I think even they thought, "Well, we better not have a
16 (aa)." So, you know, the definitions alone you would need
17 a college degree to be able to comprehend, at least a
18 college degree. So this is the place where, you know,
19 intuitive menus where people fill out something online and
20 submit it could potentially work; but to do that we need
21 to think about, well, what is the jurisdiction of the JP
22 courts.

23 Other states have been looking at this kind
24 of tribunal reform, so there are other places to look at
25 it, and Great Britain has been working on it; and, for

1 example, all child support cases from now on in Great
2 Britain, the plan is none of those will ever see a
3 courtroom. Those were all -- those will all be done
4 through technology, mostly through written submission, you
5 know, potentially I suppose through, you know, video
6 conference; but that is the place where we can -- if we
7 can make those courts more nimble and keep people from
8 having to take a day off of work to come down to the
9 courthouse, you know, we could really make a difference.

10 And if we had a commission or something like
11 that, the Supreme Court has been really effective in sort
12 of getting people together and getting these ideas
13 together and then gathering the data that we need to
14 gather, like Hayes talked about, and then making some
15 targeted recommendations, it might work. You know, in the
16 end, 2,000 of our judges, of our 3,000 judges, are these
17 judges. So we need to think about, you know, what are we
18 doing to help train these judges and prepare these judges
19 and then what can we do to make that interface easier.
20 That would be my idea, but I think it should go all the
21 way up. Just focus on those because it's a lot of people,
22 but all the courts, we've got overlapping subject matter
23 jurisdiction in lots of places. We've got -- you know, we
24 ought to be thinking about when we create a court over
25 here, how does that fit in with the architecture of the

1 whole court system rather than, oh, you know, these people
2 have to go to the Legislature and present a bill. We need
3 somebody to make recommendations about, well, how many
4 county courts are the right number of county courts, what
5 should their jurisdiction look like, and really should it
6 be consistent or not across the state, should there be
7 consistent application of the jurisdictional rules and
8 that kind of thing.

9 CHAIRMAN BABCOCK: Okay. Thank you, Justice
10 Bland. Justice Brown.

11 HONORABLE HARVEY BROWN: Well, first I want
12 to agree with comments by Bobby and Kent that we should
13 look again at how we can best use jury time. We had a
14 jury task force roughly 20 years ago. I think it was
15 1997.

16 PROFESSOR HOFFMAN: It was more recent than
17 that, but it was 2006.

18 HONORABLE HARVEY BROWN: Well, okay, I think
19 we had one in the Nineties, too.

20 MS. HOBBS: We did.

21 HONORABLE HARVEY BROWN: I think it's
22 probably time to do that again, and so I would suggest we
23 do that. Similarly, I would recommend that we have some
24 type of task force that studies municipal courts, and it's
25 funny that I was talking right after you because that's

1 the thing I wrote down for myself. You know, municipal
2 court is for a lot of cities the number one or number two
3 revenue source. That means they may have some certain
4 incentives that we need some outside group to look at to
5 make it easier for people. If you are poor and you get a
6 traffic ticket that you cannot afford to pay, you are in a
7 real quandary. Do I -- how am I going to pay it? I can't
8 pay it. I have to go down to court and sit in a courtroom
9 for half a day. I can't take off work because I can
10 barely pay my bills, and my employer may fire me if I'm
11 off work that day. If I don't go to work, I mean, if I
12 don't go to court and I don't make it immediately and I
13 sit out, an arrest warrant is issued. That's a 200-dollar
14 fine; and if it's parking issue, they're going to impound
15 my car and now I can't get to work.

16 So I think that we need to look really
17 carefully at what we could do. For example, a lot of
18 things -- I had to go down to traffic court for one of my
19 children once; and, of course, all of the lawyers got on
20 the docket right at the beginning; and everybody else had
21 to sit way at the back and wait a long time to be
22 serviced; and it was clear to me that it was difficult
23 because you had to wait for a judge to do a lot of things
24 that were I thought routine matters.

25 So, for example, if we're going to put them

1 on a deferred payment plan, it seems like to me that
2 should be something that does not need a judge. It seems
3 like there are a lot of things we could do to make it
4 easier for people to come to traffic court and take care
5 of matters within 15, 20, 30 minutes and not have to lose
6 a half a day of work. So I think we should have a study
7 to look at municipal courts; and I go back to the Chief's
8 comments in the beginning about part of what we need to
9 make sure we're doing is protect the trust people have in
10 courts; and I go to your 77 percent figure, which I didn't
11 know; but, you know, a lot of people are dealing with
12 those courts; and that's the first impression they get as
13 to how fair courts are. If they see the lawyers are
14 getting one treatment and we're getting another treatment,
15 we're maybe losing our jobs or we're facing all these
16 economic circumstances that are difficult, I think that's
17 an area that warrants some time and attention.

18 CHAIRMAN BABCOCK: Thank you. Justice
19 Boyce.

20 HONORABLE BILL BOYCE: I have less a thought
21 than a question, which is, is a continuing purpose being
22 served by having a distinction in the rules between
23 memorandum opinions and other types of opinions? And this
24 started out as a technologically based observation,
25 focusing, for example, on Justice Boyd's comments about

1 how things are migrating in a litigation and court context
2 to an online environment. Filings, records, briefs,
3 caselaw, now oral arguments at least in some courts.

4 But as I absorbed the comments as we've gone
5 around the room, I actually think there's more to this
6 than just a technological or procedural focus. I think
7 this ties into issues of transparency that have been
8 raised. I think it ties into access. I think it ties
9 into a notion of making courts easier to use. I also
10 think it ties into the notion if we're going to have the
11 legal equivalent of physicians's assistants at some point
12 and some form, how are they going to get access to the
13 tools to do legal things with. I think this is one
14 example of the intersection of technology, access,
15 transparency, trust, where all of these things intersect;
16 and I suspect there are many more of them that if we
17 brainstorm long enough we could come up with; but I think
18 as the law or at least the caselaw migrates more and more
19 online and away from a book-based, paper-based format,
20 then we need to think about whether this distinction is a
21 vestige of a paper era that doesn't really translate well;
22 and what are other examples of things that we need to
23 re-examine in light of these other considerations.

24 CHAIRMAN BABCOCK: Thank you. That's great.
25 Justice Christopher.

1 HONORABLE TRACY CHRISTOPHER: Well, I have a
2 couple of things. I would eliminate --

3 CHAIRMAN BABCOCK: Before you start.
4 Justice -- oh, Orsinger.

5 MR. ORSINGER: Well, if you don't mind I
6 would like to address what Justice Boyce just said. I
7 remember quite clearly the day that we decided that we
8 would have memorandum opinions, and it had been a lead up
9 of meetings in which we were discussing openness versus
10 the unpublished opinion approach and an opinion that came
11 out of the Seventh Circuit decrying that whole
12 methodology, and I want to -- if I -- with the leave of
13 the Chair, I want to read a quotation out of Wikipedia in
14 response to what you're saying.

15 The term in question is called "group
16 think," and the definition is "Group think is a
17 psychological phenomenon that occurs within a group of
18 people in which the desire for harmony or conformity in
19 the group results in an irrational or dysfunctional
20 decision-making outcome." We had two segments of this
21 committee, some that wanted complete openness and some
22 that wanted to continue to allow the unpublished opinions
23 that would never be read by a higher up court or anyone
24 else, and as a consolation prize to one particular person
25 on this committee that was very strongly against

1 eliminating the distinction, in my opinion, the committee
2 agreed to create this category called "memorandum
3 opinions" so that that person wouldn't have to research
4 this whole category of cases.

5 Now, in this day and time your computer is
6 going to pull it up whether it's published or unpublished
7 or, you know, whether it's a memorandum opinion or not.
8 So in my opinion that was something that we had to do in
9 order to reach consensus that day, and that consensus is
10 no longer valuable, and the distinction is no longer
11 justifiable. Just wanted to say that.

12 CHAIRMAN BABCOCK: Anything else on your
13 mind?

14 MR. ORSINGER: I've been wanting to say that
15 for 10 years.

16 HONORABLE JEFF BOYD: Just to keep things
17 peaceful, I think we all agree. It's a group thing. We
18 all agree.

19 CHAIRMAN BABCOCK: Yeah. Yeah. All right.
20 Sorry to interrupt you, Justice Christopher.

21 HONORABLE TRACY CHRISTOPHER: Oh, no, that's
22 okay. So I think we should eliminate de novo appeals from
23 justice court to county court; and if we're getting
24 justice in justice court, that should be the end. If
25 we're not getting justice in justice court, we need to

1 know why we're not getting justice in justice court; and I
2 agree with Judge Bland that the rules are not written for
3 the people that go to justice court; and probably a lot of
4 us here didn't really focus on them; but embedded in those
5 rules are things like in an eviction case you can be
6 represented by a nonlawyer. Right? That already exists
7 here in our system, and we have a lot of eviction cases
8 down there in JP court. So -- and so the JP courts are
9 10,000-dollar cases, right? There's no rules of evidence.
10 There's no rules of procedure. There are no summary
11 judgments. There are no discovery, unless you go to the
12 judge and ask for it, a la Judge Peeples' suggestion
13 earlier today.

14 There are plenty of 10,000-dollar cases in
15 county court and district court. I'm thinking we import
16 some of those things that are already existing in JP court
17 into the small dollar cases, and that would make it
18 possible for a lawyer to handle that case, because the
19 discovery is going -- you know, it's just I'm going to
20 take my case. I've got a debt. I'm going to go down.
21 I'm going to prove it up, and I can take it and charge
22 something that's low enough that a client might be able to
23 pay. I would also do a relaxed causation standard in
24 these small cases. You know, we -- when you get the de
25 novo appeal to county court sometimes we impose pretty

1 draconian standards on what seems to be a common sense
2 kind of case.

3 So I hired a contractor. The contractor
4 walked off the job. He's suing me, I'm suing him, right?
5 And suddenly I have to hire an expert to present that case
6 in county court. To me, that ought to be something that
7 the judge or the jury can listen to and decide, and if we
8 keep it within a lower amount of damages, I think people
9 would be happy.

10 CHAIRMAN BABCOCK: Thank you very much.
11 Judge Peeples.

12 HONORABLE DAVID PEEPLES: Several thoughts,
13 all unified. Several speakers have urged us to be
14 creative and think outside the box, and Tracy just did
15 some of that and others, and I think that's very good.
16 You know, some of what we do -- and I'm going to talk
17 about one of them in just a minute -- is to bring order,
18 you know, when the law has been dealing with something a
19 long time, maybe restate it and make it simple, and it's
20 right there on the bench, and I want to talk about that on
21 voir dire; but another thing I think is good for us to do
22 is just to push and come up with something fresh, and
23 maybe it won't pan out, but those are great ideas, and we
24 just heard one.

25 Kent Sullivan mentioned -- and I know that

1 he and I and Bobby Meadows and I and maybe some others
2 have talked about the jury selection and having a voir
3 dire rule, and I want to advocate that. What I have in
4 mind is to restate existing law and clarify; and if we get
5 into it there might need to be some tweaking; but what I
6 have in mind going through the cases and just summarizing
7 them so it will be on the bench and the judge will have it
8 right there and the lawyers will have it and make it a lot
9 more simple and predictable.

10 I have found in all of the cases I've tried
11 that I always breathed a big sigh of relief once we got
12 the jury picked. There was just something about getting
13 that done, and you're through that and they're in the box,
14 and I'm not saying it was hard, but you just -- it's just
15 a milestone and -- but when the law of jury selection is
16 all caselaw I mean, there's a couple of statutes, but it's
17 really in the cases; and to distill the principles, it
18 takes some work; and a lot of lawyers and judges have not
19 done that work; and I think we ought to do it for them.

20 And here's just a thought. If the rules are
21 clear -- if someone says, "Oh, it's easy, we don't need to
22 do that," I would say if the principles of voir dire are
23 easy then it will be an easy task. If on the other hand,
24 they're hard, then we need to do it, because if it's hard
25 for us, it's hard for judges and for trial lawyers, and I

1 think it's something -- one of the great things that the
2 law does, we can think creatively, and sometimes you go
3 back -- Uniform Commercial Code is a great example of
4 this. You just distill the law, and it's there in black
5 letter, and it simplifies the task for a lot of people,
6 and I think we should do that for voir dire, and I -- just
7 sort of a footnote there, I had in mind also just doing a
8 little investigative work, would be very easy in San
9 Antonio to find out how often it happens that you lose big
10 numbers of jurors from a jury panel. You lose a few here
11 and there, but when big numbers of people are challenged
12 for cause successfully, that tells me something wrong has
13 happened. The rules are not being applied correctly when
14 that happens; and the problem is not just with the
15 litigants but the representative character of the jury is
16 lost if huge numbers, huge proportions of a randomly, you
17 know, summoned venire are lost by challenge for cause.
18 There's damage done to the representativeness of the
19 institution. So I think we would be doing a great thing
20 if we have the brains in this room come up with some voir
21 dire rules that -- and I had in mind restating and
22 clarifying. There may need to be some change here and
23 there, but maybe not. I think we would be doing a great
24 service if we did that.

25 And the second thing I want to say is about

1 family law, and I alluded to this when Richard Orsinger
2 made his talk. I think that -- by the way, I just applaud
3 the Supreme Court and the Chief's letter that had the five
4 areas that we're going to study. A great part of that --
5 not all of it, but a great part of it and access to
6 justice is about family law. Yes, justice of the peace
7 courts and municipal courts, a lot of people go to those
8 courts; but in the district courts, if you take out family
9 law, there's not much of a problem left with access to
10 justice. I'm not saying there's nothing, but it's family
11 law. And when I took the bench in 1981, I -- in Bexar
12 County, like Travis County, a civil district judge does
13 civil work and family law both; and back in 1981 the
14 proportion of family law of the whole docket was maybe a
15 third. I'm talking about the time you spend, and now it's
16 75 or 80 percent, leaving about 20, 25 percent for
17 ordinary civil. The rest is family law, and one reason
18 for that is that mediation and arbitration and so forth,
19 those things have reduced the number of some of the civil
20 cases, but a lot of it is just what's happening in
21 society. Out of wedlock births, I don't know what the
22 politically correct language to use is, but paternity
23 cases. There's a bigger portion of that than divorces
24 where there are children, but there are children in these
25 cases, and the importance is just huge.

1 Now, the family law docket in a big city
2 like San Antonio and in the rural areas, it's not the
3 people that Richard Orsinger represents, and Richard and I
4 have had -- we've had cases together and so forth, but the
5 people who have the money to pay Richard, there are those
6 cases, but they're not all over there walking all over the
7 courthouse looking for help. It's the lower socioeconomic
8 people in society who go to the courthouse and usually
9 there's not much -- I think the way Shelton mentioned,
10 sometimes a negative estate, gosh, how true is that. But
11 I think what Hayes said, I'm going to look it up and write
12 it down somewhere where he said that when there are people
13 who have needs and the bar is not meeting those needs, the
14 bar should not be heard to complain when we try to come up
15 with ways to meet those needs that the bar doesn't like.
16 Now, you said it much better than I just did, but I'm
17 going to look up what you said because it was bang on
18 truth.

19 And so that's some of what the Supreme Court
20 has asked us to do in that letter of December 21st, deals
21 with this, and but family law is a driver of a lot that we
22 do; and frankly the next time this committee is
23 constituted, we might need to have another couple of
24 people on it that do some family law, because that really
25 is what we are dealing with here in terms of numbers; but

1 I also think that the jury selection rules we need to use
2 the talent in this room to restate them, and that will be
3 helpful to everybody who tries a jury case. Thank you.

4 CHAIRMAN BABCOCK: Frank had a comment.

5 MR. GILSTRAP: Quick. Ten or twelve years
6 ago when I came on the committee we spent three sessions
7 crafting a voir dire rule, and we sent it to the Court, so
8 that's there if someone wants to look at it. We also
9 spent a lesser amount of time dealing with what Pete was
10 talking about. We crafted a rule requiring the judges to
11 say what the summary judgment grounds were.

12 CHAIRMAN BABCOCK: Great. Dee Dee needs a
13 break, but this has worked out almost perfectly because we
14 have a powerhouse group of six distinguished lawyers ready
15 to finish up.

16 MR. SCHENKKAN: We're being set up, guys.

17 CHAIRMAN BABCOCK: I mean, look at this,
18 Wallace, Schenkkan, Busby, Orsinger.

19 MR. GILSTRAP: Munzinger.

20 CHAIRMAN BABCOCK: Gilstrap, and Hardin is
21 the clean-up hitter.

22 MR. MUNZINGER: Orsinger would sue you if --

23 CHAIRMAN BABCOCK: Kennon, I hope you can
24 stick around until we finish with these six. We're in
25 recess.

1 (Recess from 3:02 p.m. to 3:11 p.m.)

2 CHAIRMAN BABCOCK: All right. We are now
3 truly going over, off the deep end, with our last six or
4 seven speakers on deep thoughts. And one of the deepest
5 jurists in the room, R. H. Wallace.

6 HONORABLE R. H. WALLACE: Let me think about
7 that. To follow up on Judge Peeples, or not -- yeah,
8 about the -- not Judge Peeples. The comments about jurors
9 and dealing with jurors, helping hopefully jurors respect
10 the system, I would like to have the ability in some cases
11 where you've got a low impact, soft tissues injury,
12 \$10,000 in medical, past medical damages, to say you get a
13 six-person jury. I don't care whether you want it or not,
14 but that's what you're going to get; and, you know,
15 there's certain benchmarks you can look for in cases like
16 that. Past medical expenses is a pretty good benchmark as
17 to how serious that case is. Slip and falls, there's some
18 serious ones, but we try a lot of 12 jury cases in cases
19 with \$10,000 or less in medical expenses because the
20 lawyers will not waive and try them to a six-person jury.
21 That speeds up voir dire, and you have to summon less
22 people for your jury panel.

23 As far as what Judge Sullivan said, Tarrant
24 County has a lot of what you're suggesting already. That
25 can be done, and it can work. My only other deep thought

1 right now is on the discovery issues. Judge Christopher
2 and I have already decided to do away with
3 interrogatories, so that's --

4 HONORABLE KENT SULLIVAN: Make a note of
5 that, Mr. Chairman.

6 HONORABLE R. H. WALLACE: And I'm serious,
7 frankly, about it, because I think they're --

8 HONORABLE TRACY CHRISTOPHER: Me, too.

9 HONORABLE R. H. WALLACE: If the trial
10 lawyers would stop and think when is the last time that
11 either serving or answering interrogatories was really
12 something significant to the outcome of your case, but
13 think in term -- maybe we should think in terms of tiered
14 discovery, for lack of a better word, where the first
15 thing you do is both sides serve responses to request for
16 disclosures along the lines we have now, and we could
17 probably add some categories to take up for abolishing
18 interrogatories. And then after that's done the next
19 thing you do is say, okay, the parties exchange documents,
20 tangible objects, photos, whatever that you intend to
21 utilize to prove your case in chief.

22 That used to be the way it was done, Rusty,
23 in Federal court. That's what the prosecution had to
24 produce; and once the parties decide that, once they do
25 that, then you start deciding, now, what may be additional

1 things do we need in terms of request for production or
2 things of that nature; and then maybe that's when it would
3 be appropriate; and the process I'm describing probably
4 wouldn't even take place in 50 percent of the cases that
5 are filed. Okay. The small car wrecks, slip and falls,
6 small contract dispute, but in the cases where really the
7 significant additional discovery is involved, then you go
8 to the next step of, okay, now let's look at document
9 production. Even perhaps what depositions are needed if
10 the parties can't agree. I mean, obviously if the parties
11 are good lawyers and can agree they don't need my help;
12 and that's fine with me; but that's I guess my thought, is
13 when we talk about discovery; and maybe if that is
14 increasing the cost of litigation, should we look at some
15 type of controlled tiered discovery process like that.
16 That's all.

17 CHAIRMAN BABCOCK: Thanks, Judge. Pete.

18 MR. SCHENKKAN: I want to start by saying
19 what a privilege and honor it is to be asked these
20 questions. You look around the room and think about what
21 fun we're having and what an opportunity this is to
22 contribute to the possible improvement of what may already
23 be the best human creation ever made in its category,
24 justice. I mean, it's no Sistine Chapel, but, you know,
25 what fun. It seems to me like we ought to work from three

1 priorities. Many different topics that have been covered
2 here, many great ideas about them. First is to get the
3 facts, and that's why I really like recommendation number
4 one in the Justice Gap Commission's report, to get the
5 Office of Court Administration on the job of making sure
6 we really gather some real facts about who the
7 self-represented litigants are in these different
8 categories. I think that concept can be broadened, and I
9 just love the point that 70 whatever it is percent of the
10 cases are these municipal and JP court system. Why don't
11 we get the facts about that, see what the facts are about
12 the traffic ticket problem, and -- of all types, including
13 the revenue effects and start trying to design an
14 appropriate improvement to that system from the facts.

15 In that category, getting the facts, I
16 really look forward to learning what's happening in the
17 family law system with the use of the forms. I'd really
18 like to know how many of the problems that were predicted
19 have occurred, on what scale, and if so, in what way, and
20 maybe we can address them. I'd also like to find out what
21 did nobody say would be a consequence of doing this that
22 has turned out to be an important consequence of it, both
23 for continuing to try to fix the family law system, which
24 seems to me to be the most crucial one, the most crucial
25 failure of our system right now. I mean, tickets are bad

1 enough if people are losing their jobs and losing their
2 cars because of the system being able to process traffic
3 tickets, that's a disgrace. But the family law ones we've
4 got children and an awful lot of other important things at
5 stake as well that don't seem to be well-served.

6 The second thing I'd like us to -- urge us
7 to do is to use the technology. Don't fight it, King
8 Kadu, telling the tide not to come in is a really bad
9 idea. The forms are going to be used. People are going
10 to go online and look for the answers and look for help
11 where they can find it. We have only one option, try to
12 channel that understandable, cost efficient,
13 self-motivated, free enterprise instinct in as useful a
14 direction as we possibly can.

15 And the third is to remember this is a
16 justice system. It is not a jury trial system. It is not
17 even a litigation system. Litigation is a big
18 subcomponent of the justice system, and jury trials are an
19 important and crucial subcategory in the litigation
20 system, but this is a justice system. For those that want
21 to resist that proposition I offer as Exhibit A worker's
22 compensation. Lots of badly injured or killed workers and
23 employers with money and insurance companies, and it was a
24 complete fiasco in the industrial age, and so we just
25 wired around the rules on jury trials and all of the other

1 rules we had to until we came up with a system that we
2 thought worked better. And that's what we've got to do,
3 whether we like it or not, and then we have to try to find
4 the places where litigation in our sense, two or more
5 different advocates for different parties standing up in
6 front of at least a judge and maybe a jury as well, do
7 things, when do we actually want that to happen? When do
8 we need that to happen? And then for those how do we make
9 that part work, but a lot of the time that will not be the
10 best way to get it done.

11 It is very, very difficult to decide who
12 qualifies for one or another government benefit, but it is
13 not made easier or more likely to succeed or more
14 acceptable to people to say the only way you get to do
15 this is by hiring a lawyer and going in front of a judge,
16 isn't going to happen. We're either going to get it done
17 with some sort of form filling out process, with some
18 navigators or, you know, publicly funded staff attorneys,
19 counselors, to help people do it; or we're not going to
20 get it done at all; and so I'm encouraging us to try to
21 think of it as a justice system that's about the process
22 and the results; and both of those have to be tied to
23 efficiency and cost.

24 And then that leaves one final point, which
25 is -- and this is now back to the people in charge here.

1 It seems to me you probably ultimately have got the
2 problem of there's just too much to do at once and take
3 it -- you know, picking your shots and trying to pick some
4 ones that are big and winnable is really crucial to having
5 this whole enterprise keep moving on in the right
6 direction, but finally, thank you again for the
7 opportunity. What a great thing this is, what a great
8 thing.

9 CHAIRMAN BABCOCK: Thanks. All right,
10 Justice Busby, it's all hill to climb here, but keep us
11 rolling.

12 HONORABLE BRETT BUSBY: Okay. Just two
13 quick thoughts. One is I would suggest that we take a
14 look at revising the rules on jury charges to match what
15 the caselaw says, sort of along the lines of what Judge
16 Peeples was suggesting in another area, because we have
17 the Payne standard from the caselaw that says you just
18 have to make a court aware of what you want and get a
19 ruling, and that's not what the rules say, and so we have
20 this long comment in the pattern jury charge books about
21 how you -- you know, objections and requests and all that
22 and all the traps for the unwary that go along with that.
23 So my suggestion is let's just make the rules match the
24 caselaw and get rid of those traps and make it easier for
25 everybody.

1 The smaller suggestion I have is that we --
2 and this would take very little time, but I think it would
3 make a lot of difference to us on the court of appeals and
4 on the Supreme Court and on the Court of Criminal Appeals;
5 and that is to add something in the rules that requires a
6 uniform citation format for reporter's records and clerk's
7 records because as soon as we have that, we have the
8 software that the Fifth Circuit has given us that will
9 allow us to link directly to the record so that we can
10 click on your brief, wherever you cite that. You don't
11 even need to put in a hyperlink, and it will take us
12 directly to whatever you're citing, and that would be a
13 huge timesaver for us. It would make things a lot more
14 efficient, and it's -- the feds already have -- I know,
15 notwithstanding your earlier comments, the Federal system
16 does have a uniform citation format for that very reason.
17 It would be easy to do, and it would help us out a lot.

18 CHAIRMAN BABCOCK: Great. Thank you.
19 Richard Munzinger.

20 MR. MUNZINGER: Well, justice is not a
21 commodity, and when we attempt to apply statistics and
22 speed of sale or closing of sale or doing that, this and
23 that to it, we're applying some concepts that may or may
24 not have anything to do with what we're all about. This
25 committee is supposed to advise the Supreme Court about

1 procedure. Some justice of the Supreme Court for the
2 United States -- I can't remember who it was -- said
3 procedure is the handmaiden of justice.

4 What is justice? Well, you can get lots of
5 definitions of justice. Fairness, what properly belongs
6 to a person under the circumstances, et cetera, et cetera,
7 et cetera. So we're blessed to live in a state and a
8 constitutional republic where people are supposed to have
9 rights, the right to life, liberty, pursuit of happiness.
10 I used to teach the young associates in my firm how
11 important it was to use the correct words. We don't sell
12 shoes. If we sold shoes we would talk about wingtips,
13 black wingtip, size 7. That's not proximate cause. You
14 have to use words with precision. The idea that we need
15 to simplify jury charges and what have you has to be --
16 it's a good idea. It's a wonderful idea, but in
17 expressing these concepts we're dealing with people's
18 rights.

19 Another thing I tried to teach youngsters
20 was medicine deals with health. We deal with lives,
21 sacred honor, and fortunes; and what do we, as courts --
22 we, as a state of Texas, what we do when we make these
23 rules, we are affecting the consumers in our courts; and
24 those consumers, in fact, their cases are -- can be life
25 and death to them. Most of -- many of the people in this

1 room are parents. Can you imagine what it means to lose
2 the custody of your child? Can you really take that to
3 your heart? Good God, what a blow that is to somebody.
4 And we're dealing with justice, and so my only point in
5 raising this is I've watched the Federal courts start
6 publishing statistics so that each judge can compare his
7 speed of his docket with another's, and I've seen what
8 it's done to justice in many of the Federal courts.

9 The rocket docket in Northern Virginia.
10 Ignore the Rules of Civil Procedure. "But, Judge, you
11 took an oath to uphold the Constitution. You took an oath
12 to apply the law." The law includes the Rules of Civil
13 Procedure that talk about interrogatories. "We're not
14 going to have any interrogatory objections in my court.
15 You're going to trial in November." Is that justice? Is
16 that what this committee is about? No, of course not.

17 I agree with Pete. What a privilege it is
18 to be here and to be in this group and to see the good
19 faith and the intelligence and the desire to reach the
20 proper goal, and my only point about reaching the proper
21 goal is, remember, we aren't dealing with a commodity.
22 We're dealing with justice, and it affects individual
23 people, and whether they're rich or poor should make no
24 difference. Black or white or brown makes no difference.
25 Do you speak English? Makes no difference, if we are

1 loyal to our charge, but we are affecting people, and so
2 we say, well, we need to do this more efficiently. Yes.
3 You know, sometimes -- what does it take to bake a cake?
4 I've never baked a cake, but an hour or two hours --

5 HONORABLE JANE BLAND: You've never baked a
6 cake?

7 MR. MUNZINGER: If you cut it short, you get
8 a bad cake. We're dealing with justice. Sometimes it
9 takes time for a judge to send the jury out into the jury
10 room to listen to two argue -- two lawyers argue over a
11 point of law that can be crucial to the outcome of the
12 case that is justice to one of the parties to the case.
13 Don't take away from the lawyers and from the consumers of
14 justice or the victims of justice, whatever the case may
15 be, the right to argue their cases as best they know how.
16 You've only got two minutes. Some cases can't be done in
17 two minutes. Some concepts can't be explained to judges
18 in two minutes. Our state court judges don't have
19 briefing clerks, for God's sakes. They don't have people
20 they can turn to and say, "Run off and get me all the
21 cases on this point" or this or that. They don't have
22 that.

23 So here they are, they're sitting there with
24 their docket. "Tomorrow morning I have a divorce case,
25 Munzinger vs. Munzinger, that's a two-day case. Thursday

1 I've got to do my criminal docket." As the judge said
2 over here, you've got different judges in different
3 places. We have to be careful in adopting rules of
4 discovery, of procedure, of the disposition of cases, et
5 cetera, to understand that we are not dealing with a
6 commodity. We are dealing with people's lives, fortunes,
7 and sacred honors, and we have to be careful when we adopt
8 rules that allow us to do that with sufficient respect for
9 the law in all its beauty and sublimity. It can be
10 sublime, the law can be, if it is properly briefed,
11 explained, urged, and more importantly, applied; and
12 that's what we need to be careful about. Thank you.

13 HONORABLE TOM GRAY: Hooah. I agree.

14 CHAIRMAN BABCOCK: Okay, Frank, top that.

15 MR. GILSTRAP: Well, I'm not going to try to
16 top that. I do want to talk about something that was
17 presented at the last meeting with a certain amount of
18 urgency that was deserved and I think because of the
19 election may be in danger of falling by the wayside, and
20 that deals with access to justice for non-English speakers
21 or people who have limited English abilities. The last
22 time we talked about an initiative from the civil rights
23 division, which was based on provisions of the civil
24 rights laws which prohibit discrimination against aliens
25 and non-English speakers. The goal was really ambitious,

1 was to require not only interpreters but translations of
2 documents; and when we started contemplating that it was
3 an enormous thing. It's one thing to interpret, you know,
4 Hindi in a divorce proceeding. It's another thing to give
5 them a divorce decree that they can read in Hindi. There
6 was also a prohibition against charging any costs to the
7 non-English speaker, and this thing had a kind of an air
8 of -- a deserved air of an unfunded mandate and executive
9 overreach.

10 Now we're going to have a new
11 administration, a new attorney general, and logically some
12 of these are going to be rolled back, and I think the
13 temptation will be just to -- this is not going to be a
14 problem. I think that would be a mistake. We're going to
15 hear a lot starting in seven days about entrenched Federal
16 bureaucracy and laying siege to the Federal bureaucracy,
17 and certainly the civil rights bureaucracy is entrenched
18 and powerful. It consists of the EEOC, the office of
19 civil rights, the civil rights division of health and
20 human services, and it's very pervasive. I got in the
21 mail my new Blue Cross Blue Shield notice of my new
22 policy, and it contains a sheet that says, "If you or
23 someone who you're helping have questions, you have the
24 right to get help and information in your language at no
25 cost. Talk to an interpreter. Here's the phone number."

1 There -- this is repeated 17 times in different languages,
2 including Gujarati, Navajo, and Tagalog, which is what
3 they speak in the Philippines. There's a number on the
4 back to the Office of Civil Rights Coordinator with Health
5 and Human Services.

6 This bureaucracy is entrenched and it's
7 powerful for a reason. Civil rights are real important,
8 and they've been important since 1964 at least. It's
9 filled with career public servants who are highly
10 motivated, highly competent, and are largely true
11 believers; and if the new administration succeeds in
12 storming the Federal bureaucracy, I promise the last
13 bulwark to fall will be the civil rights division of the
14 justice department. This is not going away, and it's not
15 going away for a number of reasons, including the fact
16 that it's a legal, political, and a moral issue. I think
17 that -- that we're going to have to address this, and I
18 urge that this initiative not be put in a drawer, because
19 it's going to come get us. You know, immigration may be
20 changed, but the amount of non-English speakers coming
21 into this country is not going to stop; and if we don't
22 get ahead of the problem we're going to be bailing water
23 some day; and I just would urge the Court to not forget
24 this issue.

25 CHAIRMAN BABCOCK: Great, thanks. Thanks

1 very much. Well said. Rusty, you're used to hitting
2 clean-up.

3 MR. HARDIN: I don't want to use much time
4 obviously. I was just listening to all of this. This is
5 my third year here, and so I don't bring the institutional
6 memory so many of you do. I get concerned when I hear
7 things that, in all due respect, talk maybe about a
8 restriction on jury trials or demean the -- not demean. I
9 know you don't mean it that way, but somehow make it less
10 important to the running of the whole system. I was just
11 thinking, I -- since I do both civil and criminal and end
12 up in probate court and sometimes get caught in family
13 court, I commit malpractice in multiple areas and --

14 MR. SCHENKKAN: That's what he meant by
15 calling you a five tool player.

16 MR. HARDIN: And what I have found
17 constantly -- when I first went into private practice, I
18 was just thinking, I realized it's now almost twice as
19 long as I was a prosecutor. I was a prosecutor for over
20 15 years, but I've now been in private practice, messing
21 around with both civil and criminal for over 25 years; and
22 a constant has always been the only thing I ever felt
23 comfortable keeping the system honest about was juries.
24 When I first went into private practice in Harris County,
25 the family courts were disgraceful the way they treated

1 women. They didn't have jury trials, even though they
2 were right. About the only state I know of, maybe a few,
3 that custody cases are entitled to a jury trial. And we
4 had a group of male judges at that time that every time a
5 woman was upset about what was happening with her child
6 she was designated hysteric, and I didn't know anything
7 about family law. I had somebody nice enough to help me
8 with three different pro bono cases, and every one of them
9 the only thing that made the judge come around was the
10 fact that I said, "Look, I don't know what I'm doing. I
11 just want a jury. I just want a jury. I want 12 people,
12 and I know what's right and wrong. I don't know what the
13 law is, but I know what's right and wrong, and they will,
14 too." In every one of those cases ultimately the judges
15 backed away, and then later we changed over in the system,
16 and now the family courts mess with the men. But the
17 point being specialty courts I can't stand, because it
18 breeds an incestuous relationship where they inevitably
19 think they know better than the average citizen, and so I
20 get real concerned about when we talk about juries and
21 helping juries, I really want to do that, but I get real
22 nervous when people -- look, I'm just taking on everybody,
23 I'm sorry.

24 When we talk about voir dire, I'm a little
25 bit better because I have so much respect for the people

1 that are sponsoring it, but I get nervous that we're going
2 to talk about cutting it back. My experience has been
3 every trial lawyer before they became a judge thought voir
4 dire was the most important part of a trial. They really
5 thought it. Become a judge, it's boring, they don't want
6 to do it, and they start trying to think of ways to
7 restrict it, and all of the sudden this same guy that
8 thought juries were the greatest thing in the world, and
9 now he's got to sit there and listen to a bunch of
10 lawyers, he wants to shorten it and make it go away. And
11 at the end of the day, so I'm just hoping we talk about
12 things to let judges know -- have some guidelines. People
13 talk about time limits, and the truth is, folks, all of
14 this is happening in which we are not overburdened with
15 jury trials. Maybe outside Harris County is, but let me
16 tell you what, you can go into Harris County right now and
17 shoot a gun off starting at noon yesterday and may be
18 lucky if you find four jury trials going on. So we're not
19 overburdening the courts with jury trials, so why do we
20 want to cut back and time limit jury trials?

21 Back when I was a prosecutor I was on the
22 legislative committee for the TDCAA, and we dealt with
23 them, and the defense bar and I one time got together and
24 went to the two congressional committee -- or, excuse me,
25 representative committees, the Senate and House, and said,

1 "Look, if you promise not to pass another single law this
2 session on criminal justice, both the defense and
3 prosecution will go home, and we will not darken your
4 door." No, and so they're going to pass another 25 or 30.

5 My concern here is sometimes a committee may
6 be addressing things that don't need fixing, and so -- and
7 primary -- and I don't know, we talked about this during
8 one of the breaks. Why can't -- do we really have to have
9 everybody talking about it's always about mediating and
10 whether it's arbitration or whatever. What's mediation?
11 All of us in this room settle the same percentage of
12 cases. We all settle 85 or 90 percent of our cases. I'm
13 not talking about being the crazy aunt in the attic,
14 screaming and yelling, "I want a trial, I want a trial, I
15 want to be a macho man." We're going to have trials, but
16 what does bother me is increasingly the last 10 to 15
17 years, whether it's on the criminal side or the civil
18 side, the system seems to be geared to settlement.

19 That's fine, but there's sometimes a right
20 and a wrong, and the system doesn't seem -- whether it's
21 on the criminal or civil side, particularly on the civil
22 side, the sine qua non seems to be got to settle this
23 thing, but sometimes people need a trial, and they have a
24 right to have a trial, and I fear -- so whatever, I'm
25 going to talk about tone and then I'm going to shut up. I

1 just want us to remember it isn't just one portion of the
2 justice system. It's the constitutionally guaranteed
3 portion of the justice system. All of these other things
4 we're talking about aren't constitutionally guaranteed,
5 but a right to trial by jury is; and so every time people
6 want to start talking about restricting time, restricting
7 this, restricting that, I just always think is why is it
8 always the jury system we're talking about rather than
9 restricting -- and so why don't we want to have these
10 trials?

11 So I'm -- one of my favorite quotes of all
12 time, Judge Nancy Atlas has become a very good friend over
13 the years, but I didn't know her when she was a mediator
14 before she took the bench, and we had a case, and I was
15 the plaintiff. It was 5:00 o'clock in the afternoon, and
16 she calls me out in the -- she's the mediator. She calls
17 me out in the hallway and says, "You are congenitally
18 unsuited for mediation," and I said, "Why? Why do you say
19 that?" She said, "Because every time we get at
20 loggerheads you say 'Well, let's just go get a jury and
21 decide.'" And I go "Well, what is that four blocks away,
22 what is that building for?" I mean, is it to avoid? And
23 so I just want to always remember it is such a valuable
24 right and sometimes, and most of the time in my view, it
25 is the only way to keep the system honest, whether it's

1 judges or whether it's other professionals or others, and
2 I see clients all the time at 6:00 or 7:00 in a mediation,
3 "Why can't I have a trial?" Well, because, I don't know,
4 let's try to find out the answer, so I still want to talk
5 about trials and the rights of a citizen to get them.

6 I don't want to inconvenience jurors. I
7 know we need to try to take care of them. We need to be
8 considerate of them, but in Federal court when -- and the
9 final thing I want everybody to remember is when we talk
10 about jurors, when we talk about the system and all, and
11 we talk about judges who do this, I want everybody to
12 remember, please, the litigants and the customers, which
13 they're the clients, and their interests need to be looked
14 after as well. Thank y'all.

15 CHAIRMAN BABCOCK: Well, you can tell what a
16 great jury lawyer he is because the picture he's painted,
17 which I think will haunt me tonight, you know, the attic,
18 the crazy aunt, macho man, and screaming. Thanks, Rusty.
19 Who was it -- was it Martha? Were you the one that came
20 up with SHERLOCK? Was that --

21 MS. NEWTON: Well, that's what the Colorado
22 courts call their --

23 CHAIRMAN BABCOCK: You know what that means,
24 right?

25 MS. NEWTON: I did, but I --

1 CHAIRMAN BABCOCK: It means System Helper
2 Eliciting Reports, Law Librarians, Other Stuff,
3 Chancellors and Karma. Okay. Kennon is here, and for
4 those of you who were not on the committee when Kennon was
5 the rules attorney, Kennon used to be the rules attorney
6 for this, but now she's a -- now she's a partner in Scott
7 Douglass and was the reporter for the very important
8 Commission to Expand Civil Legal Services. She wanted me
9 to be sure in introducing her to say that Martha did
10 almost everything -- 90 percent of the work on the
11 committee, so even though not true, I'm happy to say that.
12 It probably is true. Martha has played a big role in
13 that. But, Kennon, this is I think one of the most
14 important projects we've undertaken, and if you could
15 illuminate it for us, that would be great.

16 MS. WOOTEN: Be happy to. I first want to
17 say thank you for having me here today to talk with you
18 about the report of the Commission to Expand Civil Legal
19 Services; and thank you, Justice Hecht, again for the
20 opportunity to serve on the commission. A list of the
21 members of the commission, in case you-all haven't seen
22 it, is on the first page of the report; and with the
23 exception of me, it's a very impressive bunch; and it was
24 a very good, well-rounded group of people who brought a
25 lot of different perspectives to the table; and I thought

1 that was really helpful in assessing the issues
2 confronting not only this state but states all around with
3 this justice gap and ways to lessen it.

4 So it's a privilege to serve with them, and
5 I did tell Chip that Martha did a lot of work because
6 that's very true. She had the job of taking all of the
7 reports of the subcommittees, putting them together, and
8 harmonizing them in a way that was cohesive; and I think
9 she did a yeoman's job of it and deserves a lot of credit
10 for it. Another person who deserves credit and isn't
11 listed on the report is Nina Jesu and I think all the
12 people, too, at the Court who helped with cite checking
13 and finalizing the report at the end of the day. So I'm
14 hoping that this will be more of a discussion, and I
15 probably don't have to say that to this group of people,
16 but I'm going to go over the recommendations, and I
17 apologize that I couldn't be here earlier today, and I
18 hope what I say won't be too redundant of what's been said
19 already, but I think before we dive into the
20 recommendations themselves it's important to talk about
21 the formation of the commission just a bit and what
22 prompted it.

23 So the roots of the commission obviously go
24 back to the Supreme Court of Texas. The commission was
25 created in November of 2015, and it was charged with

1 gathering and evaluating information on initiatives and
2 proposals to expand the availability of civil legal
3 services to both low and middle income Texans, and the
4 Court also asked the commission to recommend ways to
5 achieve the expansion of that availability of civil legal
6 services, and the idea was that the commission would
7 ultimately come up with recommendations that would lead to
8 actions that would hopefully help to reduce the justice
9 gap that exists in Texas and maybe even beyond Texas if
10 what we do here works.

11 I think that Chief Justice Hecht said it
12 much more eloquently than I can, so I'm just going to
13 quote what he said in describing the justice gap when
14 presenting the State of the Judiciary during the 84th
15 Legislative Session. He said, quote, "Access to justice
16 is a struggle not only for the poor but for many in the
17 middle class and small businesses who need the legal
18 system but find the cost prohibitive and are forced to try
19 to represent themselves. There are lawyers looking for
20 work and clients who need lawyers, but the cost of legal
21 services keeps them apart. This has been called the
22 justice gap, and it's growing."

23 And so I think one of the things to keep in
24 mind when looking at the report and the recommendations of
25 the commission is that the commission was looking at not

1 only this issue of the fact that so many people who can't
2 afford legal services at all are getting thrown away,
3 thrown to the side and not getting the legal service that
4 they need, but also we have all of these people of modest
5 means who simply can't afford the going rate of legal
6 services. And for people who question whether we need to
7 do something about that, I kind of challenge them to think
8 about whether they could afford their going rate if they
9 had a significant legal problem and had to go to court and
10 duke it out, and I think a lot of people couldn't, and so
11 there is a problem, and it's not only with the cost of the
12 rate of legal services, but it's also with people knowing
13 how to get connected with the lawyers who can help them.

14 And as we go through the recommendations I
15 think that we'll see a lot of references to technology and
16 the need for the rules to kind of catch up with the
17 reality that we're living in a world where there are
18 technological advancements occurring everyday and yet we
19 don't know what we can do to take advantage of them
20 because the rules are written in a way that make it
21 unclear whether we're going to be crossing the bounds into
22 prohibited conduct by virtue of doing some of the things
23 that are recommended in this report itself. And so
24 without further adieu, I'm just going to go through the
25 recommendations in the report; and to give it a little bit

1 more context, too, say that in addition to the
2 recommendations of the report and the content in there,
3 there are subcommittee reports appended to the report
4 itself and that the report is full of hyperlinks that will
5 take you to a lot of additional resources that are
6 available for review and if you ever have insomnia.

7 And on that note, I brought with me a hard
8 copy of the ABA Commission on the Future of Legal Services
9 report on the future of legal services in the United
10 States, because this is something that sort of was
11 happening in tandem with the work of the Texas Commission
12 to Expand Civil Legal Services, and there are
13 recommendations in this report that aren't set forth in
14 the Texas commission's report, not necessarily because the
15 Texas commission didn't think they were worthy of
16 consideration but rather because the commission decided to
17 focus on other initiatives that are out there and need
18 further attention.

19 So in the report one of the things that's
20 been talked about today and Recommendation 1 is that the
21 Court should work with the Judicial Council and the Office
22 of Court Administration to obtain comprehensive statistics
23 on self-represented litigants and publish those statistics
24 annually, and when we first started talking as a
25 commission about what the problem is we realized pretty

1 quickly that the existing statistics only reflect a small
2 bit of the problem, a little bit of the data, because you
3 capture the people who are self-represented when they're
4 filing cases but not the people who are self-represented
5 on the other side, not the people who become
6 self-represented over the course of the litigation, and so
7 you really can't assess the magnitude of the problem or
8 the specifics of the problem. And some people said, well,
9 we know enough to know there is a problem because of the
10 stats that are out there, so do we really need to focus on
11 the details, but I think at the end of the day the
12 commission said, yes, it's important to understand where
13 the problem resides in the Texas court system, not only
14 because it helps you with crafting solutions, but it also
15 helps you with assessing the success of the initiatives
16 that are put forth because you can see how the data trends
17 change over the course of time. And so that's the first
18 recommendation, and it's pretty straightforward, just to
19 get better data on the self-representation of litigants in
20 Texas courts and also to put that data out for public
21 consumption.

22 The second report is also pretty -- sorry,
23 the second recommendation is also pretty straightforward,
24 and I heard that there was some talk about this earlier in
25 the day about the action plan, you know, what are we going

1 to do with all of these recommendations and when are we
2 going to do something about it. And I think the idea
3 behind Recommendation 2, which is "The Court should form a
4 standing committee to maintain accountability for closing
5 the justice gap and to monitor effectiveness of reform
6 initiatives" is targeted to address that concern that you
7 have this report with all of these recommendations that
8 may sit and not ultimately lead to change that's needed to
9 lessen the justice gap. So, again, that's a pretty
10 straightforward recommendation with I guess the details
11 that you would have, stakeholders from State Bar, Texas
12 law schools, and the judicial system, that would be a part
13 of that committee to ensure that there is something done
14 to address the justice gap in Texas.

15 The third recommendation goes on to address
16 what's called pipelines, so it's a recommendation for the
17 court to encourage the State Bar of Texas, Texas Access to
18 Justice Committee and local bar associations to create
19 pipelines of services for modest means clients. Modest
20 means clients. And this is one I think is a fancy way of
21 saying -- pipeline is a fancy way of saying that
22 cooperation and coordination are critical to achieve
23 success in lessening the justice gap that we have, and
24 that leads me to my favorite quote in the whole report.
25 "Cooperation and coordination are the heat that welds the

1 available legal services providers and programs in a
2 community into a pipeline." And I think the idea is you
3 need to connect all of these people and get them talking
4 so that they understand what's the problem -- do I have a
5 problem, what's the problem, and who can help me, what are
6 my options in terms of who can help me; and so this is an
7 area where I think that there is some work that's already
8 been done that can be built upon. By way of example, in
9 talking about the pipeline, you start with the people, the
10 clients identifying legal problems, figuring out that they
11 even have a legal problem to address; and United Way has
12 already done quite a bit of work in the communities around
13 the state of Texas to help on that front with, for
14 example, this 211 line that people can call in order to
15 assess whether they've got legal problems.

16 Another thing that's referenced in here is
17 legal checkup, similar to a medical checkup, an annual
18 medical checkup you would go to talk to somebody who might
19 help you to identify legal problems that you have and just
20 didn't even realize that they were legal in nature and
21 perhaps could be addressed with the court system. The
22 other thing about the pipeline to note is that it's about
23 recognizing that you need to have ways to link up the
24 people who need legal services with the people who can
25 provide the legal services, and one of the concepts that's

1 out there that's been discussed since I've been here and
2 probably was discussed before I arrived is the navigator
3 program, which can take many different forms and is the
4 focus of one of the future recommendations in the report.

5 Another thing that's been addressed is
6 applications like Uber for lawyers you may have heard
7 about where people can get on their phone and identify,
8 okay, I've got a problem, who can help me; and so there's
9 a broad range of options out there for linking up those
10 people who need legal services with the people who can
11 provide the services both digitally and boots on the
12 ground. So the pipeline concept is all about bringing
13 those people together, and I think on page seven of the
14 report is where you really go to look at the three-step
15 plan for the pipeline.

16 The first one is to identify those service
17 providers that are out there and publicize the services
18 that they could provide. Step two is to test it, do a
19 pilot program and really figure out whether we can get all
20 of these people talking and build the synergy that's
21 needed; and then finally, step three is educational and
22 outreach programs; and, again, I go back to United Way,
23 because some work that I did with Texas Appleseed
24 previously on addressing predatory lending issues led me
25 to some people at United Way who have already really

1 gotten into the communities and figured out how to connect
2 people at least at a local level and probably have good
3 recommendations for how to take that out statewide.

4 Moving on to Recommendation 4, there's a
5 recommendation for the Court to promote both adequate
6 funding of public law libraries and to place navigators in
7 libraries, courthouses, and other public spaces. And so
8 the concept of adequate funding I think is pretty
9 straightforward but very important and not to be
10 overlooked, because I think even though we have this
11 digital age out there and a lot of people do have the
12 availability to use technology, there is still a big
13 percentage of this population that doesn't have that and
14 who still will go to the library and the courthouse to try
15 to find help. And so one of the ideas here is to take
16 advantage of the fact that those are already out there in
17 the public as being recognized symbols of justice and also
18 a source of information that people will go to, even if we
19 don't do anything in making sure that when they go there,
20 they get the services that they should receive in order to
21 work their way through the system in a way that's not too
22 intimidating or expensive to be manageable.

23 And so in the report on page eight it talks
24 about what's happening with libraries and how they're kind
25 of evolving to recognize the fact that their role is

1 greater than it used to be, that maybe they're going to be
2 a source of self-help, whereas before it was just, yeah,
3 go look for the book on row eight. It's now really
4 helping people to figure out where to go to get through
5 the justice system. One exciting thing that's happening
6 on a local level is the Travis County law library and
7 self-help center that's been rolled out recently, and
8 anecdotal evidence suggests that the judges love it, that
9 the people who come to their court who are not represented
10 by lawyers are better able to get through a hearing and do
11 everything else that needs to be done because they've had
12 help before they got to the courtroom with figuring out
13 what forms they need, how to prove up the documents that
14 need to be proved up, and so it's just making the system
15 from -- again, anecdotal evidence, it's making the system
16 a lot more efficient, and so this is a model that's
17 already in place that's working. Eric Shepperd, Judge
18 Eric Shepperd, is somebody who can speak a lot about that
19 and knows how successful it's been.

20 You'll see more content about the navigator
21 programs on pages eight and nine of the report. Again,
22 this is a concept that can be implemented in many
23 different ways, but I think it would be most helpful to
24 have a lawyer involved at some part of the process and
25 that is what's happening at the Travis County law library

1 and self-help center. You have a former lawyer, Doug
2 Lawrence from VLS, Volunteer Legal Services, so he already
3 has a wealth of information about how the system works,
4 and he's just very well-equipped to help not only the
5 lawyers who are -- I mean, sorry, the clients that are
6 coming through, but also the lawyers who are volunteering.
7 If you have somebody who really understands the system and
8 knows what it's like they can make everything more
9 efficient for the nonrepresented people and the lawyers
10 helping them.

11 Moving on to other aspects of the library
12 and courthouse system, I think it's probably something
13 that should be acknowledged that there are critics of
14 using these navigator programs more than we have before
15 and also just with having more boots on the ground, if you
16 will, including people who don't have law degrees. One of
17 the concerns that's out there is with the unauthorized
18 practice of law, and whether you're committing that by
19 virtue of giving information, what we call legal
20 information, and when do you cross the line from legal
21 information to legal advice, and that's a gray area that's
22 kind of scary for a lot of people. And so when I think
23 we're considering potential reforms that are needed, it
24 would be important to consider whether the definition of
25 the practice of law might need to be changed a little bit.

1 I know in some states it accounts for this type of work
2 that's being done and makes the definition a little bit
3 more flexible so that people will not have the fear that
4 they might commit UPL by engaging in this type of work.
5 So the concerns, again, should be considered and are
6 something to look at in terms of potential rule and
7 statute reform. Those are addressed on page nine of the
8 report.

9 Moving on to Recommendation 5, this is
10 focused on technological solutions to closing the justice
11 gap, and examining whether amendments to lawyer ethics
12 rules are needed to eliminate obstacles to innovation.
13 One of the things that I think is worth pointing out here,
14 again, is that there are some systems in place that could
15 be improved without probably too much of a headache, and
16 one of those is the existing lawyer referral program
17 that's in Texas. It's something that's been around for a
18 long time that's condoned and that's working, but it's
19 just not working as well as it could be because you have
20 the clients who maybe don't fully understand the fee
21 structure, and you also have the clients who have a
22 discounted rate for a very short period of time but then
23 are quickly in the realm of the going rate for legal
24 services that they possibly can't afford.

25 And so the idea is to maybe take that

1 existing system that's working that's been around for a
2 long time that's already condoned and expand it so that
3 lawyers could indicate on their profile if they charge on
4 a flat fee or sliding basis so that the client would know
5 that, and also to allow clients to search for lawyers who
6 accept flat or sliding scale fees by practice area and
7 geographic location.

8 So that's one area where I think it would be
9 pretty easy to work with the existing system, expand it
10 out in a way that could make a really big difference, but
11 it's limited by the fact that it's only going to help so
12 many people and it's not getting to the app concept
13 necessarily that we talked about a minute ago, the Uber
14 for lawyers, in that scenario were I think there's a lot
15 of potential to connect individuals, particularly
16 individuals who can afford some legal fees but maybe not
17 the full scale fees, to get those people in touch with
18 lawyers that can help them, and that's a win-win because
19 you have a lot of lawyers who need jobs, too. But the
20 problem is, again, the rules, the advertising rules and
21 the disciplinary realm are written in a way that doesn't
22 envision -- it just doesn't envision this type of product,
23 and so you have one professional ethics committee opinion
24 that addresses something similar, but not quite like some
25 of the developments that are being envisioned today; and

1 it restricts development because people are afraid of
2 developing these applications and running afoul of the
3 rules or getting their clients or lawyers to run afoul of
4 them. But it's an exciting realm, and in the report there
5 are some recommendations for how we can best move forward
6 with the technological considerations and understanding
7 that technology changes every second it seems, but I think
8 one of the most important things for this committee anyway
9 is thinking about the ethics rules, and that's on page 13,
10 and that's just ways that might be revised to better
11 enable a connection between the people who need help and
12 the people who can help.

13 Another concept that I think has been
14 discussed is incubators. That's addressed in
15 Recommendation 6 of the report, starting on page 13. And
16 these are, again, a -- it's a concept that takes many
17 different forms. It can be at a law school. It can be at
18 a law firm. It can be in a standalone facility, but I
19 think what they have in common is taking newly graduated
20 law students and putting them in something like an
21 apprenticeship and helping them understand how to run a
22 solo practice or a small firm practice and encouraging
23 them to kind of be more innovative in how they get clients
24 and helping them understanding they can make a living with
25 services that may not be the typical full-blown

1 representation. For example, limited scope representation
2 or something with a more flexible fee structure that's
3 more affordable to the average person.

4 Moving on to Recommendation 7. This is on
5 page 15 of the report, and this is about limited scope
6 representation, and it's an issue near and dear to Justice
7 Bland's and my heart because we were on the subcommittee
8 that addressed this topic. It's a concept that's also
9 referred to as unbundling, and I think something that a
10 lot of people don't realize, even people who are very
11 smart and people who deal with the rules a lot is that
12 it's already allowed under the disciplinary rules in
13 Texas. And a lot of people don't know that, and they also
14 may not appreciate that it's also allowed under the ABA
15 model rules, which courts will sometimes turn to for
16 guidance, but what we have now is the ability to engage in
17 limited scope representation without much guidance about
18 how you do that, and other states -- and there's a
19 detailed chart in here that you can look at to see this.

20 In other states there are procedural rules
21 in place so that the lawyer knows what to do if he or she
22 is going to engage in limited scope representation. For
23 example, what type of notice to provide the court and also
24 what to do when he or she is withdrawing from the
25 representation. Understand that it's not the typical case

1 where you're just leaving the client out on his or her
2 own, and there's some rift. It's that you were hired to
3 do a very specific thing, and now you've done it, and it's
4 time to get off the case.

5 Another thing that's not addressed in the
6 rules is what you do with the concept of ghost writing
7 when you have a lawyer who has actually written the
8 document but doesn't sign it. Do you require the lawyer
9 announce his or her involvement, or is it okay that the
10 lawyers not do? These are all questions that are not
11 addressed in the Texas Rules of Civil Procedure, so the
12 recommendations in the report kind of focus on that,
13 looking at the Rules of Civil Procedure to see whether
14 there should be some changes there and also looking at the
15 existing Texas Disciplinary Rule 1.02(b) in assessing
16 whether it should be more like the ABA model rule.

17 There's another recommendation kind of in
18 this limited scope representation role that I think is
19 really broader than LSR. This is on page 18 of the
20 report, and it's about a model rule, ABA model Rule 6.5
21 that, to sum it up, kind of lessens the typical conflict
22 of interest standards recognizing when you have, for
23 example, a volunteer lawyer who is working in a courthouse
24 for a day, he or she can't run the typical conflicts
25 check. So the ABA model rules recognize that you want to

1 encourage people to volunteer, and you don't want to make
2 them so afraid of running into conflicts that they don't
3 do it. So, again, one of the recommendations is to look
4 at model Rule 6.57 and see whether it ought to be carried
5 over.

6 And finally, Recommendation 8, a primary
7 objective of future rule-making projects should be to make
8 the civil justice system more accessible to modest means
9 clients to the extent it's appropriate to do so. So I
10 think that's a pretty self-explanatory one. I'll leave it
11 at that and just kind of open it up if people want to talk
12 about the recommendations.

13 CHAIRMAN BABCOCK: Chief Justice Hecht,
14 Justice Boyd, what's the Court's reaction to this?

15 CHIEF JUSTICE HECHT: We got the report at
16 our December administrative conference and had a -- we got
17 a draft of it ahead of time, and but we haven't had a
18 chance to talk about it yet. So we were supposed to study
19 it over the holidays and begin discussing it this month,
20 next Tuesday, particularly with respect to what should we
21 do with some sort of committee or group continuing to look
22 at this going forward and then what pieces should we start
23 on.

24 CHAIRMAN BABCOCK: Anything else, Justice
25 Boyd?

1 HONORABLE JEFF BOYD: No.

2 CHAIRMAN BABCOCK: Not going to contradict
3 the Chief today, is he? Any questions for Kennon about
4 this? Well, it's terrific work, tremendous work product.
5 You should be proud of it --

6 MS. WOOTEN: And so should the Court.

7 CHAIRMAN BABCOCK: -- as well as the other
8 people on the committee.

9 MS. WOOTEN: Yes.

10 CHAIRMAN BABCOCK: And you may have
11 gotten us a little late in the day because --

12 MS. WOOTEN: Yeah.

13 CHAIRMAN BABCOCK: -- everybody is worn out
14 from all of these deep thoughts, but our next meeting is
15 February 3rd. We'll be back to work on the various
16 projects that we have going. Frank.

17 MR. GILSTRAP: Do you have time for a light
18 thought at the end?

19 CHAIRMAN BABCOCK: A light thought will be
20 appropriate as soon as I finish with -- well, or do it
21 now.

22 MR. GILSTRAP: Okay. All right.

23 CHAIRMAN BABCOCK: Because we're not at the
24 end yet, but --

25 MR. GILSTRAP: Okay. Go ahead. That's

1 fine. That's fine.

2 CHAIRMAN BABCOCK: We're almost at the end.
3 You'll notice that there are little brown paper bags back
4 in the corner under the table back there, and each of you
5 should take a brown paper bag before you go, and in it you
6 will find a picture of yourself. So Rusty says, "I want
7 three," but anyway, it's the picture we took when this
8 committee was first appointed last year. We've got them
9 framed through Ms. Walker's efforts, and they're available
10 to be picked up. Now, to close, maybe something
11 lighthearted from Frank Gilstrap.

12 MR. GILSTRAP: First of all, thank you for
13 the picture. That's very nice. We talked about real
14 people's perception of the justice system. Yesterday I
15 was -- as I was leaving for the meeting my wife wanted me
16 to leave the TV on because she believes a blaring TV
17 deters burglars. She said to me "Don't" -- "the maid's
18 coming. Don't put it on Fox." So I had to find another
19 program, and I found a wonderful TV court program called
20 Hot Court, and it's the usual type thing. It's the usual
21 citizens up there. This was a dispute over a bounce
22 house, rental of a bounce house for a child's party. I
23 think that's a lively docket on TV, but when you looked up
24 they didn't have one judge. They had three judges, and
25 they looked and sounded like real judges. In fact, they

1 looked and sounded like real appellate judges. When the
2 trial was over, they took you back into chambers, and you
3 got to see the three judges decide the case, and having
4 been in that position and not seen three judges decide the
5 case for many years, it was wonderful to finally see it.
6 They were reasonable. It made sense. It was educational,
7 and Judge Judy was nowhere in sight, and I would really
8 recommend that you see it.

9 CHAIRMAN BABCOCK: You never saw that
10 before?

11 MR. GILSTRAP: No.

12 CHAIRMAN BABCOCK: Oh. Thanks, everybody.
13 It was a great session. I appreciate your comments.
14 Thank you. We'll be adjourned.

15 (Adjourned)

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2 **REPORTER'S CERTIFICATION**
 3 MEETING OF THE
 4 SUPREME COURT ADVISORY COMMITTEE

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8 I, D'LOIS L. JONES, Certified Shorthand
 9 Reporter, State of Texas, hereby certify that I reported
 10 the above meeting of the Supreme Court Advisory Committee
 11 on the 13th day of January, 2017, and the same was
 12 thereafter reduced to computer transcription by me.

13 I further certify that the costs for my
 14 services in the matter are \$ 1,380.00.

15 Charged to: The State Bar of Texas.

16 Given under my hand and seal of office on
 17 this the 2nd day of February, 2017.

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19 /s/D'Lois L. Jones
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